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No. 79-

IN THE
Supreme Court of the United States
October Term, 1979

PHILLIPS PETROLEUM COMPANY,
Petitioner,
v.
ASHLAND OIL, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Phillips Petroleum Company prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The original opinion of the district court is reported at 364 F. Supp. 6 and is reprinted as Appendix A at pages 1a-19a below. An opinion of the court of appeals en banc affirming the district court in part and reversing in part is reported at 554 F.2d 381 and is reprinted as Appendix B at pages 20a-53a below. The district court's opinion on remand is reported at 463 F. Supp. 619 and is reprinted as Appendix C at pages 54a-90a below. The opinion of the

court of appeals affirming the district court's judgment on the remand is not yet reported and is printed as Appendix D at pages 91a-94a below.

JURISDICTION

The judgment of the court of appeals (App. E, pp. 95a-96a, *infra*) was entered on October 15, 1979. An order denying a petition for rehearing and suggestion for rehearing en banc was entered on November 14, 1979. (App. F, pp. 97a-98a, *infra*.)[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a federal statute that in terms merely excludes helium from regulation under the Natural Gas Act is properly construed to imply a right on the part of a seller of natural gas to disregard its unfrustrated contract of sale for the entire gas stream and recover in quantum meruit for helium contained in the gas stream.

STATUTE INVOLVED

Section 11 of the Helium Act of 1925, as added by the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. § 167i, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended [15 U.S.C. 717 et seq.], shall not be applicable to the sale, extrac-

[1]The petition for rehearing was that of respondent Ashland Oil, Inc. The filing of the petition prevented the unitary judgment of the court of appeals from becoming final until it was denied, so that the time for petitioning for review in this Court was extended generally. Communist Party v. Whitcomb, 414 U.S. 441, 445-46 (1974); *compare*, as to a non-unitary judgment, Grounds v. Northern Natural Gas Co., 404 U.S. 951 (1971), *denying cert. to* 441 F.2d 704 (10th Cir.), *rehearing denied*, 404 U.S. 1065 (1972).

tion, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended [15 U.S.C. 717c, 717d], whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

STATEMENT

Effectively, what the court below has done in this case is to construe Section 11 of the Helium Act, which on its face merely removes helium from regulatory control under the Natural Gas Act, as enlarging the private rights of parties that have contracted to sell helium as part of a natural gas stream. That holding, embedded now in a final judgment of the court of appeals, presents a question that has been presented before on requests to review interlocutory decisions of the same court in this and another case. *See Northern Natural Gas Co.* v. *Mobil Oil Corp.*, 404 U.S. 1063 (1972) (Nos. 71-238, 71-243) (Stewart and Blackmun, JJ., noting their opinion that certiorari should be granted); *Phillips Petroleum Co.* v. *Ashland Oil, Inc.*, 434 U.S. 921 (1977) (No. 77-221); *United States* v. *Ashland Oil, Inc.*, 434 U.S. 968 (1977) (No. 77-530).

The entry of the final judgment makes clear that the question will not go away. It remains an important question. And it is an even more substantial question than when earlier presented because of the apparent inconsistency of the court of appeals' decision with the recent decisions in which this Court has confirmed that a private right of action not evident on the face of a congressional enactment is not to be read into the enactment unless there is some unmistakable indicium of a congressional intent to create the private right.

Factual Background

The case concerns rights under contracts entered into in 1945 and 1953 by which petitioner Phillips Petroleum Company purchases natural gas from wells in Texas produced by respondent Ashland Oil, Inc., which had obtained production rights under typical oil and gas leases. The natural gas stream from these wells contains a small but significant amount of helium, a noncombustible gas that has uses in certain technologies. The wells are located in a natural gas field rich enough in helium to make helium extraction technologically feasible — a fact known when the contracts for sale of the natural gas stream were made.

The oil and gas leases pursuant to which Ashland produces natural gas in these helium-rich fields convey to Ashland title to the helium as well as other components of the natural gas stream. And contracts such as those by which Ashland sells the stream to Phillips convey title to the helium entrained with the gas. The court below so ruled as a matter of the relevant state law in the consolidated helium title litigation, *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704, 710-15, 717-18 (10th Cir. 1971).

The Ashland-Phillips contracts were filed with the Federal Power Commission after this Court held in

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672, 681-85 (1954), that sales of natural gas by producers for resale in interstate commerce are subject to the Natural Gas Act. The contracts thereby became rate schedules under Section 4 of the Act, subject to the power of the FPC (now the Federal Energy Regulatory Commission) under Sections 4 and 5 to substitute other rates that it finds just and reasonable. 15 U.S.C. §§ 717c, 717d. The FPC has never exercised its power under these sections to prevent Ashland from collecting the full contract price of the natural gas stream.

The Helium Act Amendments of 1960

The occasion for the *Grounds* litigation and this separate litigation was the enactment by Congress in 1960 of comprehensive amendments to the Helium Act of 1925 and actions pursuant to the amendments. The Helium Act Amendments of 1960 constitute a wholly new, self-contained statute authorizing a forward-looking program for the conservation of helium. 74 Stat. 918, 50 U.S.C. §§ 167-167m. The amendments, among other things, empowered the Department of the Interior to purchase and store helium that otherwise would be wasted when the combustible gas with which it was entrained was produced for fuel. Under its new statutory authority, the Department in 1961 concluded long-term contracts to buy helium from Phillips and three other companies that had purchased and were engaged in processing natural gas from the helium-rich Hugoton-Panhandle fields of Texas, Oklahoma and Kansas. Under the contracts, the companies agreed to extract helium from the natural gas stream at plants designed by them and built at their own risk and to convey the helium to the Government to be stored for future use. Phillips and the other companies warranted their title to the helium, and the Government

agreed to reimburse the contractors for any amounts in excess of about $3 a thousand cubic feet (mcf) that they might be compelled to pay for the acquisition of the helium in the natural gas they processed.

Section 11 of the Helium Act as added by the 1960 Amendments provides that the Natural Gas Act does not apply to the sale of helium and that costs and revenues attributable to helium are to be disregarded by the FPC in any determination of rates for natural gas companies. (Pp. 2-3, *supra.*)

Litigation over the Title to Helium

The *Grounds* litigation reflected a typical attempt by sellers who witness an increase in the value of what they have sold to repudiate their sales contracts and obtain a share of the enhanced value.

As noted above, the court of appeals in *Grounds* rejected the producers' argument that helium was not covered by their natural gas sales contracts. It went on to hold, however, that Section 11 of the Helium Act, assisted by the Natural Gas Act, freed the producers of their contractual obligations so far as helium was concerned and entitled them to a quantum meruit recovery. Its decision seemed to rest on two separate bases. *First,* it depended on the purely conceptual proposition that a "utility rate," *i.e.,* the contractual price for natural gas filed as a rate schedule with the FPC, may not "be used to obtain a commodity or service which is not within the contemplation of that rate"; helium could not be within the contemplation of the filed natural gas rate because of Section 11, according to the court. 441 F.2d at 723. *Second,* the court found that FPC rate regulation had superseded contract prices and had "largely nullified" the "[c]ommon provisions of gas purchase contracts that call for periodic price escala-

tion, arbitration or renegotiation" so that the producers had not been free to obtain for the natural gas stream including helium even what their contracts entitled them to. 441 F.2d at 722. (As indicated above, that was not true of the Ashland-Phillips contracts.)

Accordingly, the court of appeals in *Grounds* reversed judgments of the District Court for the District of Kansas, which had denied recovery to the producers (and their royalty owners) on the basis of the subsisting contracts. The case was returned to the district court for a determination of the reasonable value of the helium. At about that same time, this case was tried in the District Court for the Northern District of Oklahoma.

The district court on the trial in this case followed *Grounds*. It took a very expansive view of *Grounds*, as the court of appeals itself had shortly before, attributing to it the creation of a federal cause of action for the reasonable value of the helium. (Pp. 14a-16a, *infra*.) That view was expressed by the court of appeals in *Texaco Inc.* v. *Phillips Petroleum Co.*, 481 F.2d 70 (10th Cir. 1973), another helium title and compensation case in which both parties were Delaware corporations and in which therefore there was no federal jurisdiction by reason of diversity of citizenship. The court of appeals held that the district court nevertheless had jurisdiction because the case arose under federal law within the meaning of 28 U.S.C. § 1331(a). Summarily reversing that decision on the certiorari papers, this Court held that *Grounds* did not convert an ordinary common-law contract or quantum meruit action governed by state law into a federal case merely because of the decision in *Grounds* that federal statutes deprived the helium purchasers of a defense of payment. *Phillips Petroleum Co. v. Texaco Inc.*, 15 U.S. 125 (1974)(per curiam).

The Decisions Below

The district court in the *Ashland* case, using a so-called work-back method of valuation, determined a wellhead value of helium of about $11 to $17 per mcf. (Pp. 9a-10a, *infra.*) Both Phillips and the United States appealed. The United States, which had intervened in the district court proceeding, was most concerned because the valuation adopted by the district court, if it became the pattern for other cases, would impose a heavy liability on it under the contractual indemnity clauses.

Even though this Court had by this time laid to rest in *Texaco* the mistaken idea that helium title and compensation litigation arises under federal law, the court of appeals panel that initially heard the appeals of Phillips and the United States in most respects affirmed the district court, which had proceeded on that mistaken premise.[2] A petition for rehearing en banc was granted. Meanwhile, the district court in the *Grounds* litigation had rendered quite a different valuation decision on the remand. It determined a wellhead value of only 60 to 70 cents per mcf. *Northern Natural Gas Co. v. Grounds,* 393 F.Supp. 949, 992 (D.Kan. 1974), *on remand from* 441 F.2d 704 (10th Cir. 1971). Appeals from that decision were heard en banc at the same time as the *Ashland* case was reheard en banc.

Phillips and the Government argued to the en banc court that *Grounds* was wrong in allowing any quantum meruit recovery and that, in any event, the Ashland-Phillips contracts had not been nullified or superseded by FPC regulation, as the court thought the contracts in *Grounds* had been. The court said merely that "[w]e

[2]The opinion of the panel, never reported, is printed in the appendices to the petitions for certiorari in Phillips Petroleum Co. v. Ashland Oil, Inc., No. 77-221, pp. 37a-52a, and United States v. Ashland Oil, Inc., No. 77-530, pp. 44a-63a.

decline to reconsider *Grounds.*" (P. 24a, *infra.*) The en banc court differed from the panel in that, while approving the district court's work-back valuation method, it did not agree completely with the court's application of the method. It therefore remanded for further proceedings on that issue. (P. 42a, *infra.*)

After petitions for certiorari filed by Phillips and the Government were denied, 434 U.S. 921, 968, the district court proceeded on remand to redetermine the value of helium. It arrived this time at a wellhead value of $3 per mcf (p. 89a, *infra*), which by coincidence is approximately the amount that Phillips must pay under its helium conservation contract with the Government before the Government becomes responsible to indemnify it (p. 82a, *infra*). All parties appealled. The argument on the second appeal and the court's opinion relate to the revaluation of the helium, but Phillips and the Government preserved on the second appeal their positions that, in the light of the binding, unfrustrated Ashland-Phillips contract, there was never any occasion for determining the reasonable value of helium. The court of appeals, by a panel, affirmed the district court's revaluation and remanded only for the ministerial addition of prejudgment interest, which had been expressly approved by the court of appeals on the prior appeal. (Pp. 93a-94a, *infra.*) The district court has since filed an order to include prejudgment interest in its judgment. The consolidated *Grounds* cases remain pending before the court of appeals en banc, more than three years after they were argued.

REASONS FOR GRANTING THE WRIT

This case presents the important question whether federal statutes — Section 11 of the Helium Act when read with provisions of the Natural Gas Act — override state law and deprive certain purchasers of natural gas streams

of the defense of payment according to contractual terms when they are sued for the value of the helium content of the streams. The question is important to the parties to the transactions – the natural gas producers and their royalty owners and the companies that purchase the helium-bearing natural gas. It is vitally important in principle to the Government because of the indemnification provision of each of its helium supply contracts.

The question has persisted through the many years of the helium title and compensation litigation without authoritative resolution by this Court. That litigation, except for this small piece of it, is still pending. So far as the federal courts are concerned the litigation has been and will continue to be confined to the Tenth Circuit. There will be no conflict of decisions among the circuits. The Tenth Circuit's handling of the cases demonstrates the need for guidance by this Court.

The question is important doctrinally. The decision of the Tenth Circuit that Section 11 and the other statutes affect private rights as they have been held to do is inconsistent with the recent decisions of this Court holding that private rights of action are not to be read into federal statutes when Congress has not put them there. The decision below makes an intrusion into the province of the states at least as serious as the intrusion threatened in the Court's private right of action cases of this term and last.

The Tenth Circuit has at long last entered a final judgment in a helium compensation case embodying its intrusive reading of Section 11. There are no longer possible reasons of judicial economy for this Court's not undertaking review, as there may have been thought to be when the question was presented before. The question is not going to disappear.

I

It is a basic principle of contract law that, when one party purchases from another party under a freely negotiated contract a commodity that later attains a greater value, the purchaser gets the benefit of the bargain and is not required to pay compensation beyond the contract price. *See* 3 Corbin, *Contracts* § 605, at 645 (1960). By the same rule, when the commodity declines in value, the seller is entitled to enforce the contract price. Any other rule would make commercial transactions so uncertain as to impair the free transfer of goods.

Here Phillips and Ashland freely entered into natural gas sales contracts by which, as the court ruled in *Grounds,* Phillips received full title to the entire gas stream, including the helium. Each was aware of the presence of the helium and the characteristics and uses of that element. The sales contracts were filed with the Federal Power Commission after *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), and became rate schedules under the Natural Gas Act. But that did not make them any the less contracts whose construction and performance are governed by state law. *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656, 661-65 (1961); *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950). The contract price was of course subject to adjustment by the FPC to make it accord with the statutory standards of justness and reasonableness or to avoid statutorily proscribed discrimination, preference or prejudice. At all times, however, the contract price was below the rate level prescribed by the FPC as just and reasonable for the area in which the gas was produced. So the FPC never had occasion to interfere with the operation of the contracts and never did so. In the circumstances, under the relevant state law, that of Texas, the unfrustrated contracts are conclusive of Ashland's right to recover under

an implied contract for the reasonable value of the helium. *See Phoenix Lumber Co.* v. *Houston Water Co.*, 94 Tex. 456, 464, 61 S.W. 707, 709 (1901).

If the court below was moved to ignore the contracts by a concern that Phillips and the other helium conservation contractors would otherwise enjoy a windfall, it was wrong as a matter of contract law, as we have just seen. It was also mistaken in its concern as a matter of fact. Phillips and the other contractors built expensive extraction plants and assumed the attendant risks associated with the helium conservation program. Any profits they earned, which derived from the helium conservation contracts that took account of the risks, are no windfall. The existence of the profits affords no basis for overturning the contracts by which the conservation contractors acquired the helium in order to give the original sellers of the helium a share of the profits.

II

Moved in any event the court surely was, and its vehicle for avoiding the conclusive effect of the contracts on the sellers' claims for a share of the helium contractors' profits was Section 11 of the Helium Act, added in 1960.

The purpose of the Helium Act Amendments of 1960 was to authorize the Department of the Interior to carry out a long-range program of helium conservation because the growing helium needs of the government and of industry in missile and atomic energy programs were expected to outstrip available helium resources by 1985 unless some of the helium wasted in the consumption of combustible gas was saved. *See* S. Rep. No. 1814, 86th Cong., 2d Sess. 2 (1960).

To effect this purpose in the least expensive way, Congress included statutory provisions designed to encourage

the participation of private industry in the helium program.[3] The Secretary of the Interior was authorized to acquire helium by exercise of the power of eminent domain only if he made a national interest determination and found also that the Government was unable to obtain helium by private contract "upon reasonable terms and at the fair market value." 50 U.S.C. § 167a(a)(2)(A) & (B). Congress empowered the Secretary to enter into long-term helium purchase contracts so that private industry could negotiate with banks and financial institutions for the capital necessary to build the costly extraction plants. S. Rep. No. 1814, *supra,* at 4.

That is the context of Section 11. The section itself is a direction that the Natural Gas Act does not apply to "the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled"; it further directs that related revenues and costs be excluded in ratemaking proceedings for natural gas companies under Sections 4 and 5 of the Natural Gas Act. (P. 3, *supra.*) It is obviously addressed to the FPC (now the FERC), the agency that administers the Natural Gas Act. Just as obviously, it is designed to ensure that a party holding title to helium and undertaking the risks of extracting helium is not constrained by rate ceilings prescribed by the FPC pursuant to the Natural Gas Act from being fairly compensated for the added cost and risk of helium extraction. The imposition of such public utility type constraints

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[3]Section 15 of the Helium Act states that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium. 50 U.S.C. § 167m; *cf.* S. Rep. No. 1814, *supra,* at 4 (Congress expects Secretary of the Interior to encourage growth of privately owned and operated helium industry to keep Government costs to a minimum).

on compensation for helium activities and transactions would have undermined the whole idea of the Helium Act Amendments, which was to enlist private enterprise and the profit motive in furthering helium conservation.

Precisely what Section 11 means as a direction to the FPC has been a matter of contention. Congress attempted to make itself clear by the language of the section and by the authoritative commentary of committee and individual sponsors; specifically it tried to avoid any possible inference that the FPC's power over combustible gas entrained with helium was affected.[4] There has nevertheless been litigation, before the FPC and in court, over the meaning of Section 11 in its intended sphere of operation.. *See, e.g., Panhandle Eastern Pipe Line Co.* v. *FPC,* 359 F.2d 675 (8th Cir. 1966). But there is not a hint in the committee reports, in the debates, in the hearings, or in the agency and court opinions, any more than on the face of the statute, that Section 11 might entitle sellers under pre-1960 contracts that did not distinguish the value of helium from the value of the balance of the gas stream to disregard those contracts and recover a judicially determined reasonable value for their helium.

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[4]The history of § 11 itself is in S. Rep. No. 1814, 86th Cong., 2d Sess., Pt. 1, at 5, 10 (Committee Report) & Pt. 2 (individual views of Mr. Carroll) (1960); H.R. Rep. No. 1552, 86th Cong., 2d Sess. 9, 20, 22-25 (1960); 106 Cong. Rec. 15119, 18603-08 (1960); Hearings Before the Senate Comm. on Interior and Insular Affairs on H.R. 10458 and S. 3376, 86th Cong., 2d Sess. 10-11, 41-49, 69-94 (1960); Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs on H.R. 8440, H.R. 8451, H.R. 10548, and H.R. 11030, 86th Cong., 2d Sess. 18-19, 39-43, 55 (1960).

Other discussion of compensation for helium appears in Hearings Before the Senate Comm., *supra,* at 32-39, 50-51, 53, 59, 62; Hearings Before the House Subcomm., *supra,* at 30-38, 82-88 & 106-13.

III

The court below held that Section 11, because it frees helium from regulation under the Natural Gas Act, requires Phillips and the other helium conservation contractors to pay their producer/suppliers additional compensation for a constituent element of the natural gas that the contractors have already paid for pursuant to their contracts with the producers. The reasons given by the court for attributing this effect to Section 11 are unsound. One of the reasons, moreover, is wholly inapplicable to the Ashland-Phillips contracts.

The first of the reasons that can be divined from the *Grounds* opinion amounts to an exercise in the driest of logic: When filed with the FPC or FERC, the contract price for natural gas becomes a tariff rate under the Natural Gas Act, and Section 11 says that the Natural Gas Act does not apply to helium. Thus, the court reasoned, the tariff rate cannot cover the helium. The purchasers therefore are obtaining the helium without paying for it. The en banc court said on the first appeal in this case that "Phillips acquired the whole stream or production, but has only paid for part." (P. 31a, *infra.*) The "free" helium was equated by the court with non-transportation services provided at less than cost by rail carriers and condemned by the Interstate Commerce Commission as effecting discriminations and preferences forbidden by the Interstate Commerce Act. *See United States* v. *Wabash R.R.*, 321 U.S. 403 (1944); *Baltimore & O.R.R.* v. *United States,* 305 U.S. 507 (1939). The court emphasized that the Natural Gas Act in Section 4(b) similarly condemns undue preferences or advantages. 441 F.2d at 720.

A short answer to this highly theoretical line of reasoning is that the Power Commission, the agency responsible for ensuring the integrity of the rate schedules filed with it

and ensuring that natural gas companies do not give undue preferences or advantages to some customers and not others, has not shown the slightest concern since Section 11 was enacted in 1960 over the existence of contract rates that cover helium as well as combustible gas. The reason for the lack of official concern is, obviously enough, that no one is injured in any respect relevant to the public interest served by the Natural Gas Act by continuing to give effect to freely negotiated contracts that treated helium in common with the rest of the natural gas stream.

The fragility of the theoretical "filed rate" underpinning of its decision caused the court in *Grounds* to go on to advert to the fact that all or most of the contracts involved in that case had seemingly been affected by FPC rate regulation. It said that the price provisions of the natural gas contracts "have been superseded by FPC rate regulation" and the common contractual provisions for escalation, arbitration and renegotiation "have been largely nullified by the FPC regulations." 441 F.2d at 722.

That is not true of the Ashland-Phillips contracts. At no time has the FPC made any order under Section 4 or 5 of the Natural Gas Act that prevented Ashland from collecting the full escalated contract price. Ashland during some years did not file with the FPC to take advantage of the contractual price escalation provisions, but that was its own choice. *See Ashland Oil & Refining Co.* v. *FPC*, 421 F.2d 17 (6th Cir. 1970). The court below has simply refused to recognize this distinction of this case from what it conceived to be the situation in *Grounds*.[5]

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[5] In its petition to review the original, en banc, judgment in this case, the Government urged the broader point that, even so far as the contracts in *Grounds* were concerned, there had been no showing that the FPC had ever interfered with the parties' ability to negotiate and contract freely *with respect to helium* or had altered their contract rights *with respect to helium*. In short, § 11 is not a ground for retroactively

IV

It is significant that the court below regarded itself as having established in the *Grounds* opinion a federal cause of action, based on Section 11 and the Natural Gas Act, for the reasonable value of helium. It took this Court's decision in *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U.S. 125 (1974), to disabuse the court of appeals of that idea. The Court there said that there is no "language either in the Natural Gas Act and the 1960 Helium Act Amendments or in the legislative history of these enactments that could be read to create a federal cause of action for the recovery of the reasonable value of the helium . . .."*Id.* at 128 n.2. The issue there was federal jurisdiction, but the language of the Court's per curiam opinion forecast the opinions of this term and last expressing the Court's unwillingness to infer private causes of action from congressional expressions of public policy addressed to executive or independent administrative agencies.

Though Texaco itself was out of federal court for lack of a case arising under federal law, this Court's *Texaco* ruling has not affected the course of decisions in this case or, so far as we can tell, the *Grounds* cases, which remain in the Tenth Circuit and its district courts under other

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relieving a producer of the obligation of a freely negotiated contract in which helium was assigned no separate value merely because the price of the commodity that was the principal subject of the contract is adjusted on the authority of the Natural Gas Act. "If a seller failed to negotiate separately for an unregulated commodity that he believed to be valueless, the fact that the price of the regulated commodity may later be changed should not entitle the seller to rewrite the contract with respect to the unregulated commodity." United States v. Ashland Oil, Inc., No.77-530, Pet. for Cert. pp. 18-21 & n.28. The broader ground of decision would be available to the Court were certiorari to be granted here, although we emphasize the narrower point that, on any view, the Ashland-Phillips contracts have not been frustrated by FPC rate regulation.

heads of federal jurisdiction. The en banc opinion in this case is murky, but it appears that the court believed that federal law applied either because of the very existence of the federal helium contracts, the presence of the United States as a party or its possession of the helium sold to it by Phillips and the other conservation contractors. (Pp. 36a-40a, *infra.*) This Court's admonition in *Texaco* that all that *Grounds* logically meant was the removal of the defense of payment, clearing the way for a quantum meruit recovery under state law, 415 U.S. at 129, has not been heeded. And, regardless of that, it is the very removal of the defense of payment that brings about the intrusion into matters of state concern analogous to the intrusions that this Court has sought to avoid by its retrenchment of judicial freedom to infer from federal enactments private causes of action superseding state causes of action. For the state law here is that a freely negotiated, unfrustrated contract governs the rights of the contractors and leaves no room for any quantum meruit recovery. (Pp. 11-12, *supra.*)

Thus the question is essentially the same as the question whether private rights of enforcement or recovery are created by federal statutes that do not in terms provide for such rights. The resolution of that question, as this Court has said, "is basically a matter of statutory construction. . . . [W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted . . ." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 100 S. Ct. 242, 245 (1979). This Court has already determined that the Natural Gas Act was not intended to provide a federal cause of action for parties such as Ashland, *see Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950); *cf. Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951) (Federal Power Act), and indeed has noted its reluctance to imply causes of action under statutes, such as the Natural Gas Act, that

"create duties on the part of persons for the benefit of the public at large." *Cannon* v. *University of Chicago,* 441 U.S. 677, 692 n.13 (1979).

How, then, does the court of appeals' analysis of Section 11 stand against the considerations that this Court has described as relevant in the recent opinions emphasizing the limited availability of implied private remedies under federal statutes? *See Transamerica Mortgage Advisors, Inc.* v. Lewis, *supra,* at 244 n.3, 246-47; *Touche Ross & Co.* v. *Redington,* 99 S. Ct. 2479, 2485-89 (1979); *Cannon* v. *University of Chicago, supra,* at 688-717; *Cort* v. *Ash,* 422 U.S. 66, 78 (1975). Because the issue is one of statutory construction, the language of the statute is the starting point. Section 11 says nothing specifically about opening up existing contracts that cover both helium and combustible gas. More than that, it does not indicate any intent to benefit a class of which Ashland is a member. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* at 246; *Cannon* v. *University of Chicago, supra,* at 689-92. In the context of the Helium Act Amendments of 1960, Section 11 is designed to ensure that private parties owning the gas stream may be rewarded for extracting and saving helium rather than wasting it. Ashland as a producer of helium entrained with natural gas that it had already committed and sold is not a member of that class.

The language of the statute, according to this Court, is ordinarily determinative of the question whether Congress meant to create a private right for the benefit of some specific class of persons. But if regard is had to other considerations that have been thought relevant, *see Cort* v. *Ash, supra,* at 78, there remains no basis for inferring from Section 11 an intent to enlarge Ashland's private rights. (1) Neither the legislative history of Section 11 nor any other evidence of the congressional purpose

suggests such an intent. (2) Enlargement of Ashland's private rights does not further the underlying purpose of either the Helium Act or the Natural Gas Act. (3) The subject matter, private contracts, is traditionally one of state concern except insofar as the federal regulatory agency may properly be moved to intervene, as it has not been here.

V

The way the court below has handled the important helium title and compensation litigation must be puzzling to a student of judicial administration. The consolidated *Grounds* cases initially were decided by a panel of the court. When the *Grounds* cases returned to the court after the trial on remand, they were heard en banc, along with this separate case, in which the total monetary stakes were far smaller than in *Grounds*. This case was decided by the en banc court. *Grounds* was not. After the remand trial in this case, which resulted in a very much smaller judgment for Ashland than the judgment that had earlier been reviewed en banc, a panel heard the appeals and affirmed the judgment below with only a ministerial change relating to prejudgment interest. (Pp. 93a-94a, *infra*.) *Grounds* still remains pending undecided before the court en banc, and the issues there include substantial, basic issues concerning the valuation of helium. The district court in *Grounds* used a different valuation method from that of the district court in this case; it has been neither approved nor disapproved.

Whatever judicial strategy or judicial failure may be reflected in the fact that *Grounds* has not been decided by the en banc court more than three years after it was argued, there is now a final judgment in this case. If prudential considerations relating to the lack of finality entered into the Court's earlier denials of certiorari in *Grounds* and this case, *see Brotherhood of Locomotive*

Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (per curiam), they are no longer present. The judgment here is final and squarely presents the important question we have described. There is no doubt of the Court's power to hear and decide the question now despite the earlier denials of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916). Moreover, the rights of Ashland, Phillips and the United States are concluded by the judgment regardless of any further rulings of the court of appeals or this Court in *Grounds*. There is no reason to withhold exercise of this Court's review power.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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February 1980

APPENDIX A

ASHLAND OIL, INC., *Plaintiff*

v.

PHILLIPS PETROLEUM COMPANY,
Defendant.

and

UNITED STATES OF AMERICA, *Intervenor.*

No. 67-C-238.

United States District Court,
N.D. Oklahoma.

Aug. 13, 1973.

As Corrected Aug. 31, 1973.

Gerald Sawatzky and Stanley G. Andeel, Wichita, Kan., Jay W. Elston, of Fulbright, Crooker & Jaworski, Houston, Tex., and John M. Imel, of Martin, Logan, Moyers, Martin & Conway, Tulsa, Okl., for plaintiff.

Richard B. McDermott, of Boesche, McDermott & Eskridge, Tulsa, Okl., and Don L. Jemison, Phillips Petroleum Co., Bartlesville, Okl., for defendant.

Floyd L. France and Dennis A. Dutterer, Dept. of Justice, Washington, D.C., and Nathan G. Graham, U.S. Atty., Tulsa, Okl., for intervenor.

Opinion

BOHANON, District Judge.

This action was initially instituted in the United States District Court for the Southern District of Texas, and was later, by proper proceedings transferred to this Court for trial and disposition. Ashland Oil and Refining Company

(hereinafter referred to as Ashland) originally claimed the right to recover moneys from Phillips Petroleum Company (hereinafter referred to as Phillips) representing an alleged deficiency in payments for sale of natural gas under the jurisdiction of the Federal Power Commission. Ashland also asserted claims against Phillips to be paid for helium contained in the jurisdictional mass of natural gas, and which was extracted from the natural gas stream by Phillips under contract with the United States of America through the Department of Interior, Bureau of Mines.

The Court has diversity jurisdiction and federal question jurisdiction, 28 U.S.C.A. §§ 1331(a) and 1332.

Ashland abandoned its claim against Phillips for deficiency payments for sale of natural gas under the jurisdiction of the Federal Power Commission by reason of proceedings before the Federal Power Commission, and an appeal from its order (Ashland Oil and Refining Company v. FPC, 421 F.2d 17, 6th C.A.). Consequently, the only claim remaining for trial and determination by this Court is Ashland's claim for recovery of the reasonable value of helium contained in the natural gas stream delivered by Ashland to Phillips.

Plaintiff Ashland acquired all of the interests of United Producing Company which had entered into a contract with Phillips Petroleum Company on November 8, 1945 (amended Oct. 1, 1950 & June 27, 1956) providing for the sale of natural gas from 15 wells located in Sherman County, Texas. These same parties entered into another gas purchase agreement on April 15, 1953, (amended June 27, 1956) providing for the sale of natural gas from three wells in Hansford County, Texas. These agreements were properly filed with the Federal Power Commission as provided by law and rate schedules were fixed for the sale of

said gas. These filings were required under the Natural Gas Act (15 U.S.C. § 717 et seq.) because Ashland's deliveries to Phillips constituted sales of natural gas for resale in interstate commerce. Ashland succeeded to all the rights and interest of United Producing Company. All of the wells above referred to are subject to the contract between Ashland, as successor to United Producing Company, and Phillips Petroleum Company, and Phillips Petroleum Company extracted helium which was contained in the natural gas stream as delivered by Ashland to Phillips.

Ashland's contention is that the title to the helium in the contained natural gas did not pass to Phillips under the gas purchase contracts and if and when Phillips elected to extract the helium from the natural gas stream, plaintiff Ashland was entitled to payment therefor from Phillips for the reasonable value of such helium less certain costs of extraction, and other deductions hereafter referred to.

The defendant contends that when it purchased the gas stream from Ashland, it purchased all of the elements thereof including the helium, and inasmuch as Phillips paid Ashland the Federal Power Commission rate for the gas delivered to Phillips, Phillips became the owner of the entire stream, including the helium, and therefore, is not liable in any sum to Ashland for the helium extracted. Further, Phillips presents the defense of Statute of Limitations claiming that if liable, they are liable only for the helium extracted from the natural gas for two years prior to the filing of this action and thereafter; further Phillips claims that by reason of payment to Ashland for the natural gas, plaintiff is barred by the defenses of accounts stated, accord and satisfaction, and to require payment now would be a violation of the Fifth Amendment to the Constitution of the United States.

The United States of America by Order of the Court was realigned as a party defendant.

Findings

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest element known. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., see Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10 C.A.) and in the Opinion of District Judge Wesley E. Brown, 292 F.Supp. 619 (D.C.Kan.).

2. The United States of America, through the Department of Interior and the Bureau of Mines of the Department, recognizing the need for the conservation of this rare material and its scarcity, and its need for defense purposes and other important uses, Congress enacted the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) authorizing the United States to enter into a program of conservation of helium for future use; under this program, private companies negotiated contracts with the United States of America through the Department of Interior, Bureau of Mines, to construct plants for the extraction of helium from natural gas streams, then being produced from the Hugoton-Panhandle area; otherwise, this valuable material would be lost at the burner tip of the ultimate user of the gas and discharged into the air as residue.

3. Prior to 1961, the United States Government, with minor exceptions for a short time, was the sole extractor and source of commercial helium. It controlled and fixed the price of all wholesale sales of helium.

4. Pursuant to the authority granted by Congress, the United States entered into five long-term helium purchase contracts with four companies, one of which was Phillips Petroleum Company, which contracted on November 13, 1961, with the United States to sell a helium gas mixture from two plants it proposed to build, the Sherman Helium Plant and the Dumas Helium Plant. These plants were constructed so as to extract for delivery and sale to the government a helium gas mixture (crude helium) which was to consist of at least 50% helium under the contract requirements, the remainder being essentially nitrogen. Under this contract, the United States agreed to pay a base price of $10.30 per m.c.f. (thousand cubic feet) of contained helium in the crude product, which price was subject to escalation in accordance with the contract. The base price was also subject to escalation in the event Phillips was required to pay third parties "for the acquisition of helium."[1] Specifically, under the contract between the

[1]"In addition to all other amounts payable under this contract Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company, to parties other than itself or an affiliated company for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.4 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to each such acquisition equal to twenty-nine (29) per cent of the weighted average of part two of the unit price or unit prices in effect during the time

United States and Phillips, producers of commingled helium such as Ashland and the mineral or royalty owners, being third parties, and if they were entitled to recovery from Phillips the reasonable value of the helium produced from the commingled gas Phillips was required to pay under paragraph 7.4 of the contract, part 2 of the unit price only approximately $3.00 per m.c.f. and the United States under the contract was required to reimburse or indemnify Phillips for any excess of $3.00 per m.c.f. which Phillips was required to pay. This was an important part of the contract because it indemnified Phillips against required payments to third persons of the amount in excess of $3.00 per m.c.f. and thus gave the United States the right to purchase this helium for a lesser sum than, no doubt, otherwise would have been required.

5. The United States took delivery of the helium gas mixture from Phillips and transported it through its own pipeline to storage in government-owned storage facilities at Cliffside Field near Amarillo, Texas. From there it can be withdrawn as needed, and purified to grade A helium (99.995% pure helium) in government-owned plants at approximately $2.00 per m.c.f. helium.

6. Under the contracts the government agreed to take all of the helium produced up to certain amounts, and the government sold grade A helium at wholesale F.O.B. its helium plants for $35.00 per m.c.f. and has done so since the fall of 1961. All federal departments and agencies were required to purchase their helium needs from the United States at this price. The Bureau of Mines has the statutory authority and responsibility to fix the price at whatever level is necessary to pay for costs associated with the

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covered by such acquisition multiplied by the volume in MCF of helium in the natural gas, as defined herein, covered by such acquisition."

helium conservation program, including any additional payments which may be required to be paid by the United States as a result of this case.

7. Beginning in 1961, several private helium plants have been built to sell pure helium in the private commercial market. Although the government price for its helium has remained at $35.00 per m.c.f., the prices for which helium has sold on the private market from 1963 through 1972 have ranged from $35.00 to approximately $20.00 per m.c.f. Such prices are wholesale prices and the only market prices for sale of helium in the United States during the period in question.

8. The Court finds the fair and reasonable value of grade A helium during the periods here involved was $20.00 per m.c.f.

9. Recognizing the benefit to United States and the importance of paragraph 7.4 of the United States-Phillips helium contract, the Associate Solicitor of the Division of Mineral Resources of the Department of the Interior, and who approved the contract provision, correctly described it as an escalation in price:

> "This provision in effect provides for escalation in price when the cost of the raw material increases." (Pls. Ex. 39, p. 3)

10. By reason of the above escalation provision in the contract, the United States was able to obtain a base price substantially lower than would otherwise have been possible.

11. There was no known wellhead price fixed for the helium gas in the gas stream, and it was and is impractical and uneconomical to attempt to extract the helium gas at the wellhead. This can only be done economically through large plants with large volumes of gas to process.

12. The gas stream delivered by Ashland to Phillips contained all of the natural gas liquids, such as butane, propane and pentanes plus, which Phillips extracts and did extract from the feed gas and markets these gases in liquid form. Because these rich liquids are in concentrated form (about 10% of the volume of the total feed gas stream), Phillips has been able to extract and market substantial additional quantities of such liquids, above and beyond what its existing gasoline plants would be able to extract at a substantial savings in cost. These additional liquids are in substance a byproduct of the helium plant operation.

13. Experts who testified in the trial of this case estimate that the Texas Panhandle, Southwestern Kansas and Western Oklahoma constitute 99% of the free world's known commercial reserves of helium. This area is known as the Hugoton Field, and Ashland wells which deliver gas to Phillips are in this field.

14. To arrive at the reasonable wellhead value of Ashland's helium delivered to Phillips, there should be deducted from the value those costs incurred by Phillips in extracting and delivering the helium and also the cost of purification. In determining these costs, the total costs of the helium plant itself should be credited and reduced by a fair allocation of a portion of such costs to the incremental, or additional liquids, which the helium plant generates. This can equitably be done by calculating a fair share of the incremental benefits accruing to Phillips in its natural gas liquids operation as a direct result of the helium plant operation. Failure to assign a portion of helium plant costs to the incremental liquids operation would inequitably burden the helium plant with substantial costs which are incurred and which result in the production of the incremental liquids.

15. After allowing for the following deductions, the Court finds that the reasonable value of the helium

delivered by Ashland to Phillips is shown in the following table. The deductions referred to include:

(a) All helium plant costs, including a 10% rate of return to Phillips on its stockholder equity;

(b) The incremental liquids benefit which should be applied to reduce costs of the helium plant;

(c) $2.00 per m.c.f. for purification.

16. The Court finds and is of the opinion that the following table shows the reasonable cost of extracting the helium, the reasonable value of helium on a yearly basis from the Ashland gas delivered to Phillips and further shows the volume of helium per m.c.f. extracted by Phillips for the ten-year period in question and the total value thereof; likewise it shows the interest computed at 6% per annum for the total recovery of helium delivered by Ashland and recovered by Phillips and the total amount of money judgment plaintiff is entitled to recover:

Reasonable Value Calculations

	A	B	C	D	E
	Helium Plant Costs (Plt's Ex. 61 & 62, line 10)	Liquid Benefit Credit (Plt's Ex. 61 & 62, line 12)	Net Helium Cost (Columns [a] less [b])	Minimum Value for Crude Helium $20.00 Grade A Helium Value less $2.00 / mcf Purification Cost	Reasonable Value of Helium Delivered by Ashland to Phillips (Columns [d] less [c])
		SHERMAN HELIUM PLANT			
1963	$4.82	$1.01	$3.81	$18.00	$14.19
1964	3.53	.10	3.43	18.00	14.57
1965	4.06	.27	3.79	18.00	14.21
1966	4.09	.45	3.64	18.00	14.36
1967	4.94	1.06	3.88	18.00	14.12
1968	4.22	1.16	3.06	18.00	14.94
1969	4.50	.82	3.68	18.00	14.32
1970	5.16	2.20	2.96	18.00	15.04
1971	5.31	4.29	1.02	18.00	16.98
1972	5.52	3.97	1.55	18.00	16.45
		DUMAS HELIUM PLANT			
1966	5.93	.00	5.93	18.00	12.07
1967	6.46	.78	5.68	18.00	12.32
1968	5.91	1.01	4.90	18.00	13.10
1969	6.55	.31	6.24	18.00	11.76
1970	5.89	1.04	4.85	18.00	13.15
1971	6.39	1.58	4.81	18.00	13.19

Reasonable Value Calculations — Continued

	F	G	H	I	J
	Vol. of Ashland Helium Extracted by Phillips (Plt's Ex. 14 & 15, Sch. 3)	Total Reasonable Value of Ashland Helium Extracted by Phillips Awarded to Ashland	Periods (Yrs.) at interest to July 1, 1973	Interest at 6% per year	Total Recovery By Ashland
			SHERMAN HELIUM PLANT		
	m.c.f.				
1963	7,791	$110,554.29	9½	$63,015.95	$173,570.24
1964	8,076	117,667.32	8½	60,010.33	177,677.65
1965	8,997	127,847.37	7½	57,531.32	185,378.69
1966	7,521	108,001.56	6½	42,120.61	150,122.17
1967	5,757	81,288.84	5½	26,825.32	108,114.16
1968	6,742	100,725.48	4½	27,195.88	127,921.36
1969	6,033	86,392.56	3½	18,142.44	104,535.00
1970	5,460	82,118.40	2½	12,317.76	94,436.16
1971	5,944	100,929.12	1½	9,083.62	110,012.74
1972	6,082	100,048.90	½	3,001.47	103,050.37
			DUMAS HELIUM PLANT		
1966	431	5,238.38	6½	2,042.97	7,281.35
1967	950	11,704.00	5½	3,862.32	15,566.32
1968	949	12,431.90	4½	3,356.61	15,788.51
1969	890	10,466.40	3½	2,197.94	12,664.34
1970	681	8,955.15	2½	1,343.27	10,298.42
1971	444	5,856.36	1½	527.07	6,383.43
				TOTAL	$1,402,800.91

17. The Court finds that the attorneys for plaintiff have expended many hours prosecuting this lawsuit against the defendant and are entitled to be paid the total attorneys fees as set out below:

Jay W. Elston firm	1059 hours at $50.00		$ 52,950.00
Houston, Texas	1059 hours at $35.00		37,065.00
Gerald Sawatzky firm	550 hours at $50.00		27,500.00
Wichita, Kansas	275 hours at $35.00		9,625.00
John M. Imel firm	201.4 hours at $50.00		10,070.00
Tulsa, Oklahoma		TOTAL	$137,210.00

The Court finds that the plaintiff Ashland should have judgment against the defendant Phillips for attorneys fees in the total amount of $137,210.00 for the services as above specified.

18. The Court finds that Ashland has prosecuted this lawsuit for the total helium contained in the gas stream from its respective gas wells delivered by Ashland to

Phillips; that in prosecuting this lawsuit the plaintiff Ashland has incurred and paid the following expenses which are not chargeable to the defendant Phillips, but were reasonable and necessary and should be paid on the basis of one-half by Ashland and one-half by the land-owners, mineral owners, otherwise royalty owners.

WITNESS:

Leo Garwin
326 Oklahoma Mortgage Bldg.
Oklahoma City, Oklahoma

Professional Services	1969:	$ 2,810.40	
	1973:	7,260.95	$10,071.35

Troupe, Kehoe, Whiteaker & Kent
Certified Public Accountants
2900 Power & Light Bldg.
Kansas City, Missouri

Professional Services	$24,600.00	
Travel Expenses	1,353.73	
Duplicating	425.00	$26,378.73

Tulsa Reporting Service
526 Mayo Building
Tulsa, Oklahoma

Depositions: May, 1973	$ 277.15	
Transcript: June, 1973	4,686.00	$ 4,963.15

Interrogs, Inc.
2439 Bank of the Southwest Bldg.
Houston, Texas 77002

Depositions: April, 1973	$ 552.00	$ 552.00

Fulston, Siefkin, Powers & Eberhardt
Suite 600
4th National Bank Bldg.
Wichita, Kansas

	1968	1972	1973	
Travel	$157.12		$3,028.25	
Long Distance		$6.99	239.34	
Court Reporting				
Depositions			2,385.30	
Postage		.98	19.21	
Duplicating			434.40	
TOTAL	$157.12	$6.97	$6,106.50	$ 6,270.59

Martin, Logan, Moyers, Martin & Conway
National Bank of Tulsa Bldg.
Tulsa, Oklahoma

Expenses: (7-1-69 thru 12-31-72)		
Duplicating	$ 3.90	
Long Distance	56.81	
Travel	14.40	$ 75.11

WITNESS:– Continued

Ashland Oil, Inc.
Employee Travel Expense

	1972	1973	
Ray Althouse		$169.50	
J. C. Coogan		160.23	
B. J. White		101.02	
D. W. Cox	$179.03	405.66	
	$179.03	$836.41	$1,015.44

Fulbright, Crooker & Jaworski
Bank of the Southwest Bldg.
Houston, Texas

	1966	1967	1968	1969	1970	1971	1972	1973
Long Distance	85.79	283.96	56.38	275.71	13.20	61.59	141.86	195.52
Duplicating	70.76	294.20	550.45	1,105.01	21.00	18.80	214.32	160.30
Filing Fees		25.00		15.00				
Travel		303.72	114.24	1,341.17	126.00	120.50	1,327.77	1,283.63
Printing				1,879.01	89.82			
Freight				11.30				
Secretarial				80.88			15.92	
Total	156.55	906.88	721.07	4,708.08	250.02	200.09	1,699.87	1,639.45

Total Expenses	$10,282.01	
Less Amounts Incurred in Connection with FPC Proceedings	1,922.89	
		$ 8,359.12
TOTAL OF ALL EXPENSES INCURRED		$57,685.49

The Court finds that the Plaintiff expended $57,685.49 in the prosecution of this lawsuit which is not assessable or taxable as costs against the defendant, Phillips, and that these costs should be divided equally between plaintiff and landowners, mineral owners (hereinafter referred to as royalty owners), and from the distribution made by plaintiff, Ashland, to royalty owners first should be deducted one-half of the cost above stated as paying the cost assessable to royalty owners.

19. The Court finds from a review of the pleadings, the Complaint Amended Complaint, Stipulation of Facts, the exhibits and testimony that Ashland has brought, prosecuted and maintained this action on its own behalf and on the behalf of the royalty owners for the delivery of helium in the entire gas stream on a per wellhead basis from the inception of the production of helium to June 30, 1972. The Court takes judicial knowledge of the oil and gas leases executed by royalty owners in favor of the lessee

and the assignee of the lessee, and that at the time of entering into each of the respective oil and gas leases, no thought of helium rights was considered by either lessee or lessor; that no consideration passed from one to the other for any helium rights; that the helium as contained in the gas was an undealt with commodity except that the lessee had the exclusive right to enter upon the lessor's property and drill and produce gas from said premises; that the exclusive right to drill and produce gas is a perpetual right vested in the lessee so long as oil and gas is produced in paying quantities from the premises by Ashland or its assigns.

The Court finds that the helium hereinabove referred to is and was the sole property of the royalty owners subject to the exclusive right of Ashland to drill and produce gas which contained helium and that their rights are equal and that the proceeds to be derived from the sale of helium should be equally divided between Ashland and the royalty owners and therefore the judgment herein rendered in favor of the plaintiff, Ashland, and against the defendant, Phillips, should be divided equally between Ashland and the royalty owners and on the basis of the payments heretofore made by Ashland to the royalty owners for gas produced and sold to Phillips and transported in interstate commerce under the regulations of the Federal Power Commission; and that Ashland shall first deduct from the royalty owners' portion of the judgment one-half of the costs of prosecuting this action. The equal division between lessor and lessee of the proceeds from the helium is required in equity; otherwise the windfall would give 7/8 to Ashland and 1/8 to the royalty owners, which would be unconscionable and an unjust enrichment to Ashland.

Conclusions of Law

This litigation is based primarily on the 1960 Act of Congress known as the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) where the United States was authorized and directed to enter into a program of conservation of helium for future use.

[1] The evidence is convincing to this Court that the United States, through the defendant, Phillips, and by reason of the Helium Act, confiscated the helium of the plaintiff and royalty owners rather than acquiring it by condemnation; nevertheless, the taking was in the nature of condemnation, and the reasonable value of the helium plus interest is proper; that the United States was obligated to pay the reasonable value of said helium in excess of $3.00 per m.c.f. which Phillips was required to pay for the helium all as provided by their contract.

The Court concludes that the law contained in Northern Natural Gas Co. v. Grounds, *supra* governs this case in the matter of reasonable value of helium and the obligation of the defendant to pay that value, and no other authorities need be cited.

Further the United States Court of Appeals for the Tenth Circuit laid down certain guidelines for trial courts in Texaco Inc. v. Phillips Petroleum Company, 481 F.2d 70 (opinion filed July 13, 1973). Here the Court said:

> "We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, * * *. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium

from helium extraction companies and parent pipeline companies.

* * * * * *

In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power Commission service rate and said that '*private contract law and the principles applicable thereto are not controlling.*' (Emphasis Added)

* * * * * *

No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, * * *

> '* * * the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants.'

* * * * * *

We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate.

* * * * * *

We reject defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951,

92 S.Ct. 268, 30 L.Ed.2d 267, 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751, and 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.

* * * * * *

In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium bearing natural gas produced by over 500 lessee-producers under thousands of leases.

* * * * * *

The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe the federal courts have jurisdiction under 28 U.S.C. § 1331(a)."

[2] The Court concludes as a matter of law that the plaintiffs are entitled to a legal rate of interest because of the taking. See St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (C.A. 10); T. & M. Transp. Co. v. S.W. Shattuck Chemical Co., 158 F.2d 909 (C.A. 10); Louisiana & Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (C.A. 5); Jacobs v. United States, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933).

The Court in Northern Natural Gas Company et al. v. Grounds et al., 441 F.2d 704 (10 Cir.), cert. denied, 404 U.S. 1063-1065, 92 S.Ct. 732, 30 L.Ed.2d 751, issued a post-opinion order, pertaining to costs and the mandate, recognizing the significance of the interest question. Paragraph 15 of the Order dated March 16, 1972, states:

> "The right of the lessee-producers to interest, and the amount thereof, on any sums which the District Court may adjudge to be due and owing to them shall be determined by the District Court, subject to review by this Court."

[3] The Court concludes as a matter of law that the plaintiff's attorneys are entitled to be paid by the defendants a reasonable attorneys' fee. See United States Fidelity & Guar. Co. v. Hendry Corporation, 391 F.2d 13 (C.A. 5); Boyd Callan, Inc. v. United States, 328 F.2d 505 (C.A. 5).

In T.F. Scholes, Inc. v. United States, 295 F.2d 366 at 370 (C.A. 10) the Court said:

> "The fixing of reasonable attorneys fees rested in the sound judicial discretion of the court. . . ."

In Texas Gas Corporation v. Hankamer, 326 S.W.2d 944 (Tex.Civ.App.) it was held that gas and distillate delivered by appellees and processed in a plant was "material furnished", and an award of attorneys' fees was upheld.

The Court concludes as a matter of law that the plaintiff is entitled to judgment as follows:

(a) That plaintiff, Ashland, should have judgment against defendant, Phillips, for helium extracted for the ten-year period from 1963 to December 31, 1972, together with yearly interest thereon at the rate of 6% per annum ending June 30, 1973, in the total amount of $1,402,800.91.

(b) That plaintiff should have judgment for attorneys' fees, otherwise professional services rendered by plaintiff's attorneys in the prosecution of this action in the amount of $137,210.00.

[4] (c) That the royalty owners should be paid one-half of the proceeds derived from the sale of helium less one-half of the expenses of $57,685.49 incurred and paid by Ashland in the prosecution of this action and not chargeable to the defendant Phillips.

(d) That the prayer of the Intervenor United States of America is denied.

An appropriate judgment will be entered as herein provided.

Judgment

Based upon the Memorandum Opinion, Findings of Fact and Conclusions of Law filed herein this day, the Court enters the following judgment:

1. It is ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc., shall have judgment against defendant Phillips Petroleum Company in the amount of $1,402,800.91 together with accruing interest as provided by law from date of judgment, until paid, for helium sold and delivered during the ten-year period ending December 31, 1972.

2. It is further ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc. shall have judgment against the defendant Phillips Petroleum Company in the amount of $137,210.00 together with accruing interest as provided by law from the date of this Judgment until the Judgment is paid as reasonable attorneys' fees in the prosecution of this action.

3. It is further ordered, adjudged and decreed by the Court that Ashland Oil, Inc., on receipt of the payment of the helium together with interest thereon, as provided in

item (1) above, shall deduct therefrom its expenses of prosecution in the amount of $57,685.49 and pay to its royalty owners on the basis of payments heretofore made to its royalty owners for gas sold and delivered and transported in interstate commerce one-half of said helium receipts together with its one-half of the accrued and accruing interest.

4. It is further ordered, adjudged and decreed by the Court that the defendant Phillips Petroleum Company pay the usual and ordinary costs of this litigation as provided by the Federal Rules of Civil Procedure.

5. It is further ordered, adjudged and decreed by the Court that the prayer of the Intervenor, United States of America, be, and the same is hereby denied. The defendant Phillips Petroleum Company has made no claim for relief as against the United States of America.

APPENDIX B

United States Court of Appeals
Tenth Circuit

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC., *Appellee, Cross-Appellant,*

v.

PHILLIPS PETROLEUM COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, *Intervenor-Appellant.*

Appeal From The
United States District Court
For The Northern District
of Oklahoma
(D.C. # 67-C-238)

(Filed May 10, 1977)

On Rehearing En Banc

Richard B. McDermott, Tulsa, Oklahoma (Lloyd G. Minter and Don L. Jemison, Bartlesville, Oklahoma, with him on the Brief), for Appellant, Phillips Petroleum Company.

Gerald Sawatzky, Wichita, Kansas (Jay W. Elston, Houston, Texas, John M. Imel, Tulsa, Oklahoma, Arloe W. Mayne, Ashland, Kentucky, W.O. Strong III, Houston, Texas, and Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Fulbright, & Jaworski, Houston, Texas, and Martin, Logan, Moyers, Martin &

Conway, Tulsa, Oklahoma, of Counsel, with him on the Brief) for Appellee-Ashland Oil, Inc.

Floyd L. France, Attorney, Department of Justice, Washington, D.C. (Peter R. Taft, Assistant Attorney General, Nathan G. Graham, United States Attorney, Hubert A. Marlow, Assistant United States Attorney, E. Edward Johnson, United States Attorney, Jon K. Sargent, Assistant United States Attorney, Edmund B. Clark, Dennis A. Dutterer, George R. Hyde, and Jacques B. Gelin, Attorneys, Department of Justice, with him on the Brief), for Intervenor-Appellant, United States of America.

Before LEWIS, Chief Judge, BREITENSTEIN, SETH, MCWILLIAMS, BARRETT AND DOYLE, Circuit Judges, sitting en banc.

SETH, Circuit Judge.

DOYLE, Circuit Judge, dissents. Dissenting opinion attached.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom, and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity, and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in

the several opinions hereinafter cited. It is, however, necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. § 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

We are here concerned with the Government contract with defendant Phillips whereby the helium was physically acquired by the Government, but the ownership and com-

pensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as compensation to defendant. The record shows that this figure was arrived at by comparison of the estimated cost to the Government had it built its own plant. No relationship of this figure to any then market values was developed in the record. This was a base price of $10.30 per mcf and was subject to escalation under Paragraph 7.3. Paragraph 7.4 provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendant would pay the first $3.00 per mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States, with the United States providing an indemnification for required payments above the stated amount. There are other qualifications also.

It is obvious that this litigation wherein compensation is demanded by the interest owners of the helium was con-

templated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part decided in the *Consolidated Helium Cases (Northern Natural Gas Co.* v. *Grounds,* 411 F.2d 704 (10th Cir.)), opinion by Judge Breitenstein. The basic legal relationships among the landowners, producers, and gas purchasers were there established, as was the relationship of the Natural Gas Act and the Helium Act. The controlling rules were set in the *Grounds* opinion, en banc consideration was denied, and the Supreme Court denied certiorari. We decline to reconsider *Grounds.* Further, in *Grounds* we held that ". . . the lessee-producers are entitled to the reasonable value of the contained helium." The problem of the amount of reasonable compensation, and who should pay, was not decided in Grounds, and was remanded to the trial court. The *Grounds* case is again before this court en banc and was consolidated for hearing with this case, but is not considered in this opinion.

When the matter of compensation is in issue we are faced with a somewhat different aspect of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement are all still important, but the relationship of the contracting parties to those who now have been determined to own interests in the helium, and, of course, the value of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The Complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, cited 28 U.S.C. § 2201, and recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking the "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium in turn sold to the United States under the contract referred to above. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . .. " The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be

changed to Ashland Oil and Refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought by Ashland against the defendant Phillips to recover the reasonable *wellhead value of helium commingled with the FPC jurisdictional Gas,* but separated at defendant's plants constructed pursuant to the Helium Act and delivered as "conservation helium" to the Bureau of Mines. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases,* or *Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds,* there considered and rejected. It would serve no purpose to again consider these arguments. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

It must be accepted that the "value" sought to be determined in this suit is basically a factual matter determined through the application of the appropriate legal doctrines. This is the value at the wellhead of the helium commingled with the natural gas there being produced.

The appellants here urge as a basic error by the trial court that it chose the wrong method in arriving at this "value." The trial court determined that there was no prevailing market value for the commingled helium, there

was no free competitive market for this helium at the wellhead. The court thus used a market value for the ultimate product less the cost of beneficiation of the helium-bearing gas. The defendants urge that the trial court had sufficient evidence before it of a "market value" of the commingled helium at the wellhead.

The defendants, on their "market value" theory, put on testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component. These described events covered a broad time span and a wide geographical distribution. They involved both governmental agencies and private parties.

The trial court, in holding that there was no free competitive market, held that these transactions were of no probative value because they were not comparable. It thus concluded that the evidence failed to establish a "market price" by comparable sales. We reach the same conclusion. The transactions described by the witnesses for the defendant were too remote in time or place, and otherwise could not be considered as comparable. The testimony did not show a free market condition to establish a usable price. It is apparent that the gas stream here concerned with all its components was directed by the FPC, and was locked in by the jurisdictional gas. There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases. The helium thus had to go along with the stream. The purchasers of the stream here concerned, of course, took the position that they owned the entire contents, and were not required to pay anything more. This litigation demonstrates the character of the market, the Government domination of the market, and the strength of bare possession.

In the market price evidence of the defendant, considerable detail is presented as to purchases at the several

Government helium plants. These include the plants at Exell, Otis, Cunningham, and Navajo. The helium purchases or gas purchases at these plants were made during World War II. The years which have passed since "The War" would seem to cast more than a doubt that these could possibly be comparable sales. The purchases at the Navajo plant were renegotiated after the War in 1955 and 1959, but again this cannot be a comparable transaction. The stream from the Rattlesnake production had no use as a fuel. It did have a high helium content, but nothing is developed as to any other market for this gas. The Government had for all practical purposes a monopoly on sales of helium until about 1962.

There was also testimony as to purchases of gas by the Government for the Keyes plant in 1958. The price was somewhere near $2.00 per mcf. The production costs at this plant were about $15.50 per mcf. The basic interest of the seller was to make the residue gas marketable by raising the BTU. The seller also assumed liability for possible additional payments to third parties.

The Otis plant was also used to upgrade the gas for fuel purposes by separating out the noncombustible portions of the stream.

Phillips also introduced evidence as to several *contracts* it had made for the payment for components of the gas production purchased. Some mentioned helium, some did not. This was a dollar price in some, and a formula as for all other components in others. These are not of particular significance, especially the casinghead gas contracts, because there was no evidence that the casinghead gas contained helium nor was ever processed for helium. As to the other Phillips contracts, there was no showing that the gas had a helium content at all (with insignificant exceptions),

nor that there was ever a remote possibility of extradition, again with insignificant exceptions. Contractual provisions in such a context, even where helium was mentioned, are a meaningless gesture of the parties, and cannot be considered as evidence of comparable *sales*.

The Gas Sales Agreement between Colorado Interstate and Alamo Chemical Company (a Phillips affiliate or subsidiary) was put in evidence. This provided for the processing of gas produced in Morton County, Kansas, for the removal of helium and liquefiable hydrocarbons. The plant operator was to pay $2.00 per mcf for helium extracted at the plant. This price was not negotiated, and it seems reasonable to assume that this was because there was litigation pending as to the obligations to pay for helium involving the parties. The contract limited the sellers' liability on the title warranty of helium to $2.00 per mcf. There was no contract provision for payment for hydrocarbons removed. This contract must be considered for all practical purposes as a post-litigation contract. There was also in evidence a gas exchange agreement between Phillips and Pioneer Natural Gas Company. This had a price for helium but there were other contractual considerations such as delivery of gas at other locations, and payment for only part of the helium. This agreement cannot be considered as a comparable sale.

The testimony of the defendants and evidence was thus directed to "other sales" in other places and other times. There was no substantial showing that these were "comparable sales." Evidence of "other sales" falls far short of establishing a market without comparability being clearly established.

In addition to the evidence relating to particular contract provisions, and some sales, there was expert

testimony. The plaintiffs and defendants had expert witnesses who testified as to what the value of helium should be. This testimony produced by both sides is of theoretical interest, presents a facet of the entire conservation program, and a description of the few independent private enterprises which tried to enter the field. No matter how interesting, this evidence is only opinion evidence, and does not establish facts. This testimony comes well down on the scale of acceptable evidence as to value. It is obvious that comparable sales or current market price is the best, and second would come the work-back method. The expert testimony of the type here presented would come somewhere after that. The experts were extremely capable, experienced persons who gave well considered and conscientious expression of their opinions, but nevertheless it remained opinion evidence on a matter of objective facts.

We thus must agree that the trial court was correct in seeking an alternative method to "market price" for establishing the reasonable value of the helium component at the wellhead. It is obvious that the comparable sales-current market price is by far the preferable method when it can be used. However, it cannot be used when the elements necessary for its proper application are lacking. The trial court thus had to resort to a work-back method or price less costs of beneficiation. This was a less desirable method but perfectly valid. Under this method a point was selected where there can be determined an established price and the cost of processing or beneficiation were deducted to move back to the place where the value must be established.

The work-back valuation is well recognized in the production and early processing of natural gas. It is commonly used, according to this record, in placing a value on feed stock for gasoline plants and related processing. There is

nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply. There is here concerned a single plant constructed and operated for the specific purpose of extracting helium. Other costs, and other elements can be established. This work-back method was used by the Government and the Court of Claims in making payment to the Navajos for gas supplied to the Navajo Helium Plant. *See Navajo Tribe* v. *United States,* 364 F.2d 320, 176 Ct. Cls. 502. The Government has used it on other occasions such as for Kerr-McGee royalty payment in Arizona, and under different circumstances. As to the work-back as a method for valuation, *See also* Brown, Law of Oil and Gas Leases, § 6.09; *Harding* v. *Cameron,* 220 F.Supp. 466 (W.D.Okl.); and Sneed, 25 Tax L. Rev. 641. This method to establish value has not only been used in the petroleum industry, but also in other natural resources cases. *See United States* v. *Wyoming,* 331 U.S. 440; 67 S.Ct. 1319, 19 L. Ed. 1590; *Black Crystal Coal Co.* v. *Garland Coal & Mining Co.,* 267 F.2d 569 (10th Cir.); and *Greer* v. *Stanolind Oil & Gas Co.,* 200 F.2d 920 (10th Cir.). *See also* the gasoline plant case, *Freeland* v. *Sun Oil Co.,* 277 F.2d 154 (5th Cir.), which is a common use in the industry.

Phillips argues that its right to acquire the helium component was covered by its contracts, and neither the Helium Act nor the Natural Gas Act altered these contracts. Thus there was a Fifth Amendment violation if its property was "given" to another. This court on the *Grounds* case really decided this issue and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part. We said in *Grounds,* "In our opinion private contract law and the principles applicable thereto are not controlling." Apparently the Government has yet to pay Phillips for much of it also.

The appellant next argues that the value less expense method was not only inapplicable, but it was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This element however was not adequately developed by the proof and further hearing is required on this element.

The appellants also object to the allowance made by the trial court of $2.00 per mcf for the "treatment" of the "crude" helium sold to it by Phillips (to be incurred by the Government before resale), as insufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiffs; this price issue was not met by defendant by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program — The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point, and *United States* v. *Fuller,* 409 U.S. 488, 93 S. Ct. 801, 35 L.Ed. 2d 16; which in turn cited *United States* v. *Cors,* 337 U.S. 325, 69 S.Ct. 1086, 93 L.Ed. 1392. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. It was a stockpiling of a commercial product. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court allocated part of the plant expense to these liquids as by-products. The evidence is unclear that an increase in the production of liquids would result from the helium plant operation over what had been experienced before and over ordinary extraction plants. Appellants

maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extractions. The record shows that increased quantities of wet gas were directed to at least one of the plants, and this could make a difference in the production of liquids, but no figures were produced by defendants. Under this state of the record, we must hold that the trial court did not have adequate data to this element. Different quantities of liquids were produced at different plants, and this may result in different helium values at different plants. In view of the evidence, this was a consequence of the application of the expense element in the formula. However, further evidence on this aspect is needed.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base figure for the helium-nitrogen mixture it was buying from Phillips under its contract. This may be a consequence of the decision, but there is no reason why the well-head price should be determined by the contract price. This payment was not necessarily the "price" of the helium as other considerations were present. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences of the transaction including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. This has been done, but the price "paid" for all the interests in the helium has not yet been determined. The value here sought to be established is in-

dependent of the contract base amount, and is to be of all interests of the proper parties.

We have considered *Lippert* v. *Angle,* 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof with which we agree, but the case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also Greenshields* v. *Warren Petroleum Corp.,* 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in *Texaco Inc.* v. *Phillips Petroleum Co.,* 481 F2d. 70 (10th Cir.), which was thereafter reversed by the Supreme Court in *Phillips Petroleum Co.* v. *Texaco Inc.,* 415 U.S. 125 94 S.Ct. 1002, 39 L. Ed. 2d 209. That case was concerned only with federal question jurisdiction under 28 U.S.C. § 1331 (a), and not whether state or federal law controls. The United States was not there a party. Federal jurisdiction is here conceded.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit, and the Government has asserted a claim or an interest. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was

considered in the *Consolidated Helium Cases,* and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States undertook to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas above a certain figure. This is in the nature of an indemnity agreement and the contract contains qualifications and limitations not here concerned. The United States is liable for some of the additional amounts which Phillips will have to pay. The Government has thus entered the litigation to assert its own position and interest under the contract. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie* v. *Tompkins.* This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in *Northern Natural Gas Co.* v. *Grounds,* 441 F.2d 704 (10th Cir.), and by the record here, the Government in the several cases before this court is faced with claims made by a multitude of interest owners from many states relating to production

from Kansas, Oklahoma, and Texas. Each state has somewhat different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L. Ed. 838, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. *Tompkins* does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the

laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was suggested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also National Metropolitan Bank* v. *United States,* 323 U.S. 454, 65 S.Ct. 354, 19 L.Ed. 383, limited by *Bank of America* v. *Parnell,* 352 U.S. 29, 77 S.Ct. 119, 1 L. Ed. 2d 93. The War Bond cases in state and federal courts lead to the same result. *See In re Stanley's Estate,* 102 Colo. 422, 80 P.2d 332. The Court in *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956, also indicated a considerable area to be excluded from the application of *Erie.* There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in *Holmberg* v. *Armbrecht,* 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv. L.Rev. 976, and 105 U.Pa.L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366, 63 S. Ct. 573. *See also United States* v. *Allegheny County,* 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In *United States* v. *Standard Oil Co.,* 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of

the application of state law upon the governmental interests is a factor of great weight. *See United States* v. *Mitchell,* 403 U.S. 190, 91 S.Ct. 1763, 29 L.Ed. 2d 406.

The Court in *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187, considered the application of a Louisiana statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.'" [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States* v. *Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was efficient and effective. In so doing it set up the contractual barriers between itself and the landowners and gas producers, and also put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and

looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie* v. *Tompkins.*

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See deHaas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (10th

Cir.). We must conclude that this action has not been barred. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed. 2d 713.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361; *St. Paul Mercury Indemnity Co.* v. *United States*, 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed. 2d 703, a Miller Act case. The opinion includes a direct and intensive consideration of attorney fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'"

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co. See also Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141.

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the

value of the helium, as above indicated. The judgment is also set aside as to the valuation determination with direction to hear further the matters or elements of the work-back method, referred to above, wherein there was insufficient evidence in the record.

Thus some elements have been considered in this opinion and ruled on.

On remand the trial court shall also consider whatever other elements that may be developed at further hearing, in making the value less expense or work-back determination.

Thus, we affirm the use of the work-back method of determining value and the use therein of the $2.00 figure for treatment of crude helium. We set aside the values which the trial court determined by the use of the work-back method. On remand the trial court shall give further consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method.

We affirm the decision of the trial court that the action is not barred by any statute of limitation and that prejudgment interest may be allowed. We reversed those portions of the judgment that (1) allow attorneys' fees and (2) divide the recovery equally between the lessors and the lessees. The lessors may recover only the amounts determined by the royalty provisions of their leases.

AFFIRMED IN PART, REVERSED IN PART, and remanded for further proceedings in the light of this opinion. Each party shall bear its own costs.

DOYLE, Circuit Judge, dissenting.

I respectfully disagree with the result of the majority opinion and, particularly, that part of it which affirms the trial court's use of the work-back theory or approach in determining a reasonable value for the commingled helium at the wellhead. My disagreement stems from the following: the work-back approach is not the preferred way to determine market value of a commodity; the starting point for determining value is wrong; and the result of its application here is an excessively high price to the government.

Both the government and Phillips Petroleum favor the comparable sales plus expert testimony method; this is the view that I Prefer.

I

Whether the United States Contemplated, as the Majority Maintains, the Paying of a Substantial Amount at a Subsequent Time to Lessee-Producers and Landowners

I must disagree with the conclusion in the majority opinion that it was within the contemplation of the contracting parties that there would be a large amount paid to interest owners of the commingled helium at some future time. My reasons are as follows:

The Bureau of Mines had entered into contracts for the purchase of extracted helium with four companies, including Phillips, who had possession of the natural gas stream. By so doing the government avoided the necessity for identifying and dealing with all possible interest owners of the helium.

It is true that paragraph 7.4 of the contract with Phillips provided for the partial indemnification of Phillips by the

United States for amounts paid subsequent to the date of the contract for the acquisition of helium in the natural gas or for any interest therein. But to raise the obligation of indemnification, the United States had to consent to the payments or the payments must have been judicially determined or they must have been made in accordance with guidelines established in judicial proceedings. In the Phillips contract indemnification came into being only after Phillips paid in excess of about $3.00 per mcf to third parties for interests in the helium.

The point that is here made is that although the government might have been aware of some indemnification possibility, it did not contemplate the kind of payments that would be necessary if the work-back method were to be followed in both the Ashland and the Helex cases.

The findings of the trial court do not support the statement in the majority opinion that it was contemplated by Phillips and the United States that there would ultimately be substantial compensation paid to the interest owners. Memoranda written by the Associate Solicitor of the Division of Mineral Resources, Department of the Interior, and by the chief helium contract negotiator for the Bureau of Mines mentioned the possibility of increased contract prices if the government required the extraction companies to give a warranty of title without some government indemnification for helium payments. But there is no evidence that the original amounts to be paid were simply a down payment. There was no prior experience of paying large sums of money for this helium. Mr. Wheeler of the Bureau of Mines testified that in building the cost model to arrive at a government negotiation position, a $2.00 per mcf amount for the commingled helium had been used because that amount reflected the government's experience in obtaining a supply of helium-bearing gas. It had never paid more than $3.00 per mcf.

The $3.00 per mcf indemnification level was not an arbitrary figure. It represented a ceiling above actual payments on previous occasions. It was an estimation of the probable maximum price that might be paid. Therefore, it is not an established fact that here would be payments in excess of $3.00 per mcf as the majority assumes. Even if some excess above $3.00 per mcf was in the minds of the negotiators of the contracts, it was not any great amount. For example, there is no evidence that it was contemplated that the price would go to $10.30. There was no evidence of a belief that it would exceed $2.00 to $3.00. If it was thought that the $2.00 to $3.00 was just the beginning, it seems likely that the extraction companies would have not left the remaining amounts up to $10.00 to $14.00 to chance. Their contemplation would in some way have been expressed.

II

Whether the Evidence of Comparable Sales Was, As the Majority Maintains, So Lacking in Probative Value As to Require That It Be Disregarded

The reasons which the majority opinion gives for rejecting evidence of comparable sales for the purpose of establishing reasonable value include, first, that the transactions described by the witnesses which showed comparable transactions or sales were said to be too remote in time or place. The opinion goes on to say that the testimony did not show a free market condition capable of establishing a usable price.

Secondly, it is said that the helium was part of the gas stream and that this was subject to regulation by the FPC and that this also restricted the opportunities for renegotiation of sales or the negotiation "with new purchases."

The fact that the government was the dominant factor in the market should not, we submit, produce a higher price, for it only tends to show that there was no market for the conservation program gas. Stated differently, there was no demand for it. Where that is the situation it usually means that it is not worth much. The only reason that it was worth something to the government was because the government had some interest in conserving it. It had some defense projects and space projects in which it might be used and also there is belief by some that in the future it might be of some value in creating an atmosphere for the performance of special tasks. If, as the opinion states, there is neither demand nor market for this, it would seem reasonable to adopt a pricing policy which gives to the lessee-producers such as Ashland actual cost plus a reasonable profit.

My objection to the work-back method is in its artificiality. Interestingly, it fails to start with real cost figures—its beginning is with opinion evidence given by Mr. Garwin, who was employed as manager of the Kerr-McGee plant. He testified on behalf of Ashland. His opinions were based on the price of *pure* helium sold by the government and private companies. He referred to present sales of pure helium on the private market as being $20.00. The government had charged $35.00 not because this represented a fair price. Rather, the government had no choice since it was required by law to charge that amount. The majority apparently has questions about the validity of the $20.00 starting point. It does not give a reason for its dissatisfaction. My objection is its gross excessiveness and its lack of reality.

Moving backward from a $20.00 price for pure helium to the cost of the gas purchased by the government which was not pure helium but was composed of about 50 percent helium and 50 percent nitrogen, deductions for the

cost of extracting helium were made. The end result is prices ranging from $11.76 to $16.98 per mcf for the years 1963-71. The government has already paid to Phillips $10.30 per mcf which includes the cost to Phillips of building an extraction plant. Inasmuch as the government is obligated to indemnify Phillips for all sums exceeding $3.00, this means that the difference between the $11.76 to $16.98 figures and the $3.00 indemnification threshold will in all probability be paid in addition by the government.

The trial court and the majority opinion here made no effort to isolate a rule or procedure to ascertain actual market value either from the standpoint of comparable sales or original cost or reproduction cost. It gave its full and exclusive blessing to the work-back theory. The legal objection to this is its secondary evidentiary character. It is secondary because it is called into use only if it is impossible to ascertain actual market value, from comparable sales, for example. It would have been valid to have used it for comparison purposes, that is to test and to compare the validity of the price arrived at by some other more accepted method, but this has not been done. We find them embracing it wholly and completely. This was not justifiable since there was evidence of comparable sales either at the wellhead or at the inlet of the plant.

It is more specifically objectionable because of the $20.00 starting point. If they were going to select a stage in the process and deduct costs in order to arrive at the selling price at the wellhead or at the plant inlet, they should not have started with a product which has nothing whatever to do with this case, that is they should not have attempted to discover a price for pure helium. Instead they should have looked to prices of conservation helium gas with 50 percent helium content and the remainder nitrogen, for this is the product that is sold to the government. The beauty of

starting with crude conservation helium is that they had a demonstrable sale in front of them and that is the sale from Phillips to the government for the sum of $10.30 for conservation helium. From this point it would only have been necessary to deduct the costs of extraction and of transportation from the wellhead to the extraction plant. Had they done this they would have come up with a price close to $3.00. It could be more or less. For comparison purposes they could look at the actual sales at the wellhead or at the plant inlet and this would have given them a true picture. It is worthy of note that this is exactly what Judge Brown did in the Helex cases, and his result is realistic and reliable. Judge Brown, needless to say, did not accept the work-back theory as an exclusive formula.

In the cases which have used the work-back method, I find that in each instance the court started out with a clearly supported market price and not a contrived one—a price well established in a real market for the specific commodity to be valued—or with proceeds from the actual sale of the commodity at some later point in its processing. *See Freeland* v. *Sun Oil Company,* 277 F.2d 154 (5th Cir. 1960); *Black Crystal Coal Co.* v. *Garland Coal and Mining Co.,* 267 F.2d 569 (10th Cir. 1959); *Greer* v. *Stanolind Oil and Gas Co.,* 200 F.2d 920 (10th Cir. 1952). *See also Stafos* v. *Missouri Pacific Railroad Co.,* 367 F.2d 314 (10th Cir. 1966).

This court in *United States* v. *Sowards,* 370 F.2d 87, 91 (10th Cir. 1966), showed that no one method need to be exclusive unless it clearly establishes the price. It pointed out that the federal concept of market value is closely related to selling price on the market and that the best evidence is comparable sales even though the determination is not limited to that method. It approved the use of other data where there are no comparable sales and noted

that in condemnation cases market value may also be based upon reproduction costs or capitalization of net income or an interaction of these methods together with comparable sales. It said that all of this must look to what a willing seller would sell for and a willing buyer would pay. The *Sowards* decision nevertheless showed a preference for comparable sales. On the other hand, the work-back method is to be resorted to only where everything else fails.

In summary, then, it was wrong to adopt the work-back method as an exclusive one. It was wrong to start at the point where the trial court started and, of course, the result is an untenable one because it unnecessarily produces an excessive price.

What about the comparable sales which the majority opinion condemns?

We must bear in mind that the contracts entered into by the government looked to prices in 1961. The Keyes plant was cited for example and this involved purchases of gas by the government in 1958 at prices approximating $2.00 per mcf at the extraction plant inlet. The production costs were about $15.50 per mcf, but the basic interest of the seller was to make residue gas marketable by raising the BTU content. This was the approach that was used in the Otis plant also. It was seeking to upgrade gas for fuel purposes.

I would submit that the fact that there was this kind of motivation does not outlaw the comparable sales evidence. Removal of helium as an aid to the heating quality of the gas ought not to render the evidence of the sale noncogent.

The purchases of the government plants at Navajo, Exell, Otis and Cunningham are said to be out of time because

they occurred in 1945 during the War. They are hardly more remote from 1961 than are the sales cited by Mr. Garwin, that is the $20.00 sales which occurred in relatively recent times. There were also purchases of helium-bearing gas for the Navajo plant in 1955, 1959, and 1962; all at about $2.00 per mcf for helium content at the plant inlet.

The gas sales agreement between Colorado Interstate and Alamo Chemical Company, a Phillips affiliate, which were at $2.00 per mcf does not appear to be out of line. The 1945 Navajo sales just referred to were determined by the Court of Claims to have a value of $2.99 per mcf. The fact that they occurred in 1945 could be taken into account, but this is a two-edged sword because there was some actual demand for this gas during the World War II period.

I am not saying that the comparable sales should be accepted as gospel. This does not mean, however, that we should bury our heads in the sand to them. We can at least view them without fear of being contaminated. The probative value of actual sales is that they provide a more rational and realistic view of value than does some theoretical approach such as the work-back approach because these are actual demonstrations. The majority opinion does not tell us where the social or other value is in the work-back theory. As suggested before, it might be palatable if actual cost figures were used in arriving at a starting point. It is, however, lacking in palatability when the opinion of the chief witness for Ashland that $20.00 is a fair price for pure helium is accepted completely as the starting point for a work-back process.

The foregoing is important because we are dealing not with $100,000 or even a few million. Ultimately if the work-back formula is used this could mean—and we consider not only this case but its companion, the Helex II

cases which have yet to be handed down but which are likely to follow this same formula—hundreds of millions of additional dollars to be paid by the government for a commodity which at best has an uncertain value now and which does not promise to have any added value in the future.

III

Whether Today's Decision Will Result In The Government's Being Compelled To Pay An Unreasonably High Price, An Amount Which Is Beyond the Market Value Of The Helium Gas

What would be the effect if the work-back method were applied to the *Helex II* cases?

Most of the helium in the United States occurs in Kansas, Oklahoma and Texas. It is not surprising, therefore, that the companion case to this present one, the so-called *Hellex II* cases, arose in Kansas. The enormity of the occurrence was probably responsible for the helium conservation program in the beginning. These Kansas cases have been before this court previously. They were filed in 1964. The first one was decided at trial in 1968. It is reported in 292 F. Supp. 619. That decision was reviewed by this court in 1971. *Northern Natural Gas Co.* v. *Grounds,* 441 F.2d 704. This initial case was primarily concerned with title to the helium. Following remand, trial was had in order to determine value. As in the instant case, the government had already paid a substantial amount, about $12.00 per mcf, which purported to represent the cost of the extraction plants as well as the cost of the helium. The action was in interpleader. Its purpose was to determine the value of the helium and hence the obligation, if any, of the government or a party to pay additional amounts. At the trial evidence of comparable sales was not dissimilar to the evidence offered at the *Ashland* case. There was a

difference. A good deal of opinion and interpretative evidence was offered on behalf of the government. In sum, the government presented a real case in this instance—a much stronger case than was brought forth in *Ashland.*

The trial court's findings were much different. Utilizing the comparable sales, and the opinion evidence, the trial court found that the value of helium at the wellhead was $.60 to $.70 per mcf. As a result, the government was not required to pay any more than the $12.00 which it had paid for the gas at the well plus extraction expense including building a plant. This was because the value found was less than the $3.00 amount beyond which the government was required to indemnify. The additional amount $.60 to $.70 had to be paid by the Helex companies to the lessee-producers.

If the formula approved in the present case were to be applied to the *Helex* cases there may be a far different result. I am not saying that it will. I do not know. The trial record is superior in the *Helex* cases and this could change it. On the other hand, the work-back doctrine is firmly adopted. If this present *Ashland* ruling becomes a precedent for the upcoming *Helex II cases,* the result could be a disaster to the government in that it could virtually double its cost. The price could go from $12.00 (the amount already paid and which under the *Helex* trial court's decision is the entire sum), to as high as $24.00.

The *Ashland* case is in sharp contrast. The trial court, as we already know, employed the work-back method in arriving at values of commingled helium. The prices which it adopted were $11.76 to $16.98 per mcf for the years 1963-72. This was in addition to the 10.30 already paid by the government to Phillips to cover the total cost of extraction plus cost of gas at the well. The majority opinion in this case gives restricted approval to the work-back method. It remands for additional proceedings to reconsider three factors used. In remanding the case the majori-

ty opinion has not, as we have also noted, given the trial court any guidance as to what is sought and as to how these factors are to be determined. Therefore, the outcome of the remand as it effects the values in the *Ashland* case cannot be anticipated. These values may be lower or they could just as easily be higher. Thus, both the viewpoint and the result in *Ashland* are entirely different from the approach and result in the *Helex II* cases. That is why I am apprehensive as to possible results in the *Helex* cases when the court gets around to applying the work-back theory as now enunciated.

We are mindful that the government has already paid the extraction companies a total of about $12.00 per mcf for the 36,500,000 mcf's of crude helium in *Helex*. This is a sum of about $438 million for helium which has been purchased and which has been stored under the conservation program. We cite it to show the magnitude of this purchase and the extent to which the government would be called upon to indemnify if the work-back method were to be applied in the *Helex II* cases. If the pattern of the present case continues, there could be additional payment of from $9.00 to $12.00 per mcf. It remains to multiply 36,500,000 mcf by the $9.00 or $12.00 addition in order to view the dismal news.

I submit that the *Helex II* cases ought to have been the precedent and the model rather than the Ashland case.

* * * * * *

Finally, this entire helium conservation program is affected with a public interest. As the majority notes, there is no competition to provide low prices. It is a monopoly condition and the determination of reasonableness of prices has devolved on the courts. The court should, of course, see to it that the companies involved in the production of the helium receive fair compensation. Fair compensation does not mean that the participants should receive profits of the possible magnitude indicated here.

APPENDIX C

ASHLAND OIL, INC., *Plaintiff,*

v.

PHILLIPS PETROLEUM COMPANY,
Defendant,

and

UNITED STATES OF AMERICA, *Intervenor,*

No. 67-C-238.

United States District Court,
N.D. Oklahoma

Dec. 28, 1978.

Gerald Sawatzky of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., John M. Imel of Martin, Logan, Moyers, Martin & Conway, Tulsa, Okl., and W.O. Strong, III, Ashland Oil, Inc., Houston, Tex., for plaintiff Ashland Cil, Inc.

Don L. Jemison, Phillips Petroleum Co., Bartlesville, Okl., and L. K. Smith of Boone, Ellison & Smith, Tulsa, Okl., for defendant Phillips Petroleum Co.

John E. Lindskold, Dennis A. Dutterer and Andrew F. Walch, Dept. of Justice, Washington, D.C., and Hubert H. Bryant, U.S. Atty., and Hubert A. Marlow, Asst. U.S. Atty., Tulsa, Okl., for intervenor United States.

Memorandum Opinion

BOHANON, District Judge.

Introduction

(See also Findings Nos. 1-13)

Plaintiff Ashland seeks compensation for helium contained in the natural gas stream acquired from plaintiff by defendant Phillips, which was subsequently extracted and sold separately to the United States government. Originally tried in 1973, this case was remanded on appeal to retry controlling factual issues. In the first trial plaintiff and defendants' legal theories and approaches were sufficiently divergent to prevent a joining of issues. Consequently, crucial factual considerations were never fully developed evidentially. At retrial the significant factual matters were developed more fully and thoughtfully than before. Thus, the court must be amenable to discarding earlier erroneous conclusions. The interests of justice, aptly perceived by the circuit court opinion in this case, require no less.

In adjudicating this controversy a second time, the court was assisted by the appellate court's enunciation of certain controlling legal principles. The basic legal relationships among the landowners, producers and gas purchasers were established, notably including the lessee-producer's right to the reasonable value of the contained helium. *Northern Natural Gas Company v. Grounds,*, 441 F.2d 704 (10th Cir. 1971); *Ashland Oil, Inc. v. Phillips Petroleum Company* (hereafter *Ashland v. Phillips*), 554 F.2d 381 at 384 (10th Cir. 1975).

The prime responsibility of this court is to determine the reasonable value of the helium herein when commingled at the wellhead with other natural gas. *Ashland v. Phillips, supra* at 385-386. Such "value" is basically a factual matter to be ascertained through application of the appropriate legal doctrines. *Ashland* v. *Phillips, supra* at 385. Optimally, a product's "fair market value" is determinable by examining comparable sales of the same product. *Ashland* v. *Phillips, supra* at 387. Significantly, some sales of com-

mingled helium offered in evidence here were too remote in time, and otherwise incomparable, to be relied on solely.

The "Work-Back" Method

The next best approach is the "work-back" or "value less expense" method whereby a raw material's value is extrapolated by using as a starting point an end product of that material whose value is certain. The costs of transforming the raw material from the stage where its value is unknown to that where its value is certain are subtracted from the starting value to reveal the value being sought.

> "The work-back valuation is well recognized in the production and early processing of natural gas. . . . There is nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply." *Ashland* v. *Phillips, supra* at 387.

Effective application of this method requires selection of an appropriate starting value in the form of a processing stage whose product possesses a value certain; accurate assessment of the costs accruing between the known stage and the one in question is also essential. In developing a resource from a raw material into a finished product, each production stage will add economic value to what was initially only the value of the raw material. The value added at each stage of production is essentially the cost of resources used in taking the material through that stage of production. The work-back method essentially establishes at each production stage the value of the product at that point. By subtracting out all production costs, the value of

the raw material is revealed.[1] Application of this approach, however, can be difficult. Market structures vary at different production stages and correlating figures from one stage to the next can require abstruse analytical calculations, easily resulting in error. The selected starting point should be as close as possible to the production stage in question.[2]

With these theoretical considerations in mind, two potentially viable starting points emerge. One is helium in

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[1] "Yes, I am familiar with the workback method of discovering the value of a raw material where there are no comparable sales that can be used to attribute value to it. Essentially, as I understand it, if a raw material is scarce enough to command a price or to have an economic value, then, this raw material may go through several stages of production and production process to turn it into an end product. At each of the production stages, there will be value added to what was originally a value of the raw material. The value added at each stage of production is essentially the cost of resources used in taking the material through that stage of production.

Now, then, a workback amounts to determining at some stage, at some market, at one of the stages of production, what the value of the product up to that point really is. Then we subtract out the costs and that should leave us with the economic value of the raw material, if the starting point is correct, if the workback is correctly done." (Tr. 368-369, Dr. Richard H. Leftwich, Regents Professor of Economics and former head of the Department of Economics at Oklahoma State University.)

[2] ". . . [I]f you work back through several successive stages in going from one stage of the production process to another, there are likely to be errors involved, errors involved in computations. There will be errors involved because market structures differ at differing stages of production, and the more stages of production that you work back through, the more likely we are to compound these errors and to wind up with an erroneous computation, an erroneous value for the raw material. . . [I]t seems to me that the appropriate starting point is the closest identifiable market to the raw material." (Tr. 369-370, Dr. Leftwich, supra)

See also the testimony of Dr. Ezra Solomon, Dean Witter Professor of Finance at Stanford University, at Tr. 418.

its crude form; the other is helium in its pure Grade A refined form, the starting point initially adopted by this court.

Refined Helium Market

(See also Findings Nos. 14-18)

If one fact has clearly emerged at retrial, it is the inappropriateness of using refined helium prices as a starting value in extrapolating commingled helium's value at the wellhead.

Possession of a production phase where the raw material has been processed to a point of possessing a value certain is crucial to the work-back method, whose efficacy is based on employing known data to extrapolate the unknown. Refined helium prices for the time period relevant to this case were not only distorted by monopolistic market conditions which prevented pure helium's prices from reflecting the product's "fair market value," but even more significantly there was never any relationship whatsoever established between the commingled helium in this case and any refined helium market.

All of the commingled helium in this case was processed into crude helium and placed in underground storage by the government, where it remains today. None has been refined into Grade A helium.[3] It was acquired with conser-

[3]". . . [T]he crude helium that has been put into the government's Cliffside field . . . was never produced to supply current demands. . . . We don't know when it's going to be used. We don't know what purpose it's going to be used for, and we don't know what price it's going to be sold for sometime in the future, when and if it's ever used. . . .

So, it's setting there, and it's in the Cliffside field, and there is 36 billion cubic feet of it. Now, 2 billion cubic feet of that was put in there by the Bureau of Mines, so only 34 billion cubic feet represents

vational intent and for consumption at some undetermined future time. Any suggestion that the helium in this case could have been refined and subsequently sold at then prevailing market prices of $20 to $35 per Mcf is at variance with what the most persuasive evidence before this court demonstrates to be the truth.[4]

Refined helium prices during the period in question consistently were distorted by effects of a monopolistic seller's market and never were determined by free and open competition. Government prices based on long-term policy considerations completely dominated the market in the initial years is significant to this case, and were influential throughout the entire course of the pertinent time period. Introduction into the refined helium market of even a small percentage of the large helium quantities at issue here would have plummeted prices industry-wide, not only because any reasonable competition would have constituted an effective assault on the then prevailing artificially high price structure, but also due to the relatively

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helium that was obtained from the conservation companies. . . ." (Tr. 321-322, Henry P. Wheeler, Jr., former Assistant Director to the Bureau of Mines responsible for the government's helium conservation program)

"Q Of all of the helium acquired under the conservation program is all of it in storage at Cliffside?

A Yes, it is." (Tr. 283, 284, Ray D. Munnerlyn, Chief of the Helium Division of the Bureau of Mines)

4". . . Ashland's calculations assume that if more crude had been refined, that the price would not have changed. Basic economic principle called the law of demand tells us that this is false, and the numerical analyses that I have just gone through show just how false this kind of an assumption, an underlying assumption can be. Because only a very small increase in the quantity of crude refined would lead to a relatively large decrease in the price of the Grade A helium." (Tr. 794, Dr. Ronald Braeutigam, Professor of Economics at Northwestern University).

inelastic helium demand at the time. Only a small number of end uses for refined helium exist, and those end uses can absorb only limited quantities of refined helium.[5] When a product is available in quantities greatly exceeding anything the market requires or can absorb, the excess amount is worth very little and will tend to severely depress prices, as competition forces sellers to unload their product for virtually anything they can get.[6]

Large quantities of crude helium were produced and sold in the United States during the years in question. In comparison, very small quantities of refined helium were bought and sold. In light of the inelasticity of demand for refined helium, and the marked disparity volume-wise between crude and refined helium, the best evidence indicates that a 1 percent increase in the refinement of available crude helium would have led to a drop in refined helium prices of at least 5 percent, and possibly in excess of 9 percent, depending on the year chosen.[7] Introduction

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[5]"There are a small number of end uses of refined helium and each of these end uses can absorb only limited quantities of refined helium." (Tr. 386, Dr. Leftwich, supra)

[6]"We could have gone out and been very hard bargainers, playing one of these companies against the other, because obviously some of them are going to get something for their helium and some of them were not . . . ." (Tr. 324, Wheeler, supra)

[7]". . . [T]he volume of the crude helium was something like five to nine times the volume of the helium in the Grade A market, depending on which year you pick. So, for example, if we were to take one percent of the crude in any given year that had been produced and convert that to Grade A, then, you would get from five to nine percent change in the quantity of Grade A helium. And using this information on elasticity of demand, we conclude that the one percent increase in the quantity of crude which is refined would lead to a drop in price in the Grade A market, at least five percent, and maybe even more than nine percent, depending on the year we pick." (Tr. 793, Dr. Braeutigam, supra)

of a large quantity of such helium into the market would have driven the price down to near zero.[8]

The salient fact questions herein can in no manner be resolved by reference to the refined helium market. The helium here was never refined, and it never influenced or was affected by any refined market. Simply stated, in this case refined helium prices represent an inappropriate and unsatisfactory starting point for application of the workback method. The best evidence repeatedly emphasizes the ineffectiveness of attempting to infer the value of large quantities of crude or commingled helium, based upon the relatively small number of refined helium market transactions.[9]

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[8]"If a very large quantity of Grade A helium or refined helium were thrown on the market, this would drive the price down to near zero." (Tr. 387, Dr. Leftwich, supra)

[9]"It is simply not proper to infer the value of a large amount of crude helium, based upon the small amount of helium in the Grade A market. And to illustrate this. Suppose we did start with that $20 price of Grade A helium and suppose following the workback method we subtracted off the cost of converting crude helium to Grade A helium to arrive at some kind of net price for crude helium. The next step in the workback method then would be to try to compute a value for all of that crude helium, and this would be done by taking the net price that we calculated and multiplying it by the quantity of crude. The problem which arises is simply this. It imputes a value to all of the crude helium, based upon the $20 attached to only a very small volume in the Grade A market. In other words, the method that was proposed by Ashland assumes, in principle, if not in fact, that we could have refined all of that crude helium and sold it in the Grade A markets, and that the price would not change from $20. This violates the fundamental law which economists call the law of demand, namely, we know that if the quantity of Grade A helium had been larger, that the price would have dropped. And this is exactly the point that Ashland has ignored in coming up with this workback method and applying the $20 figure as though we can impute a value to all of that crude helium based on that quantity, which is very small in the Grade A market." (Tr. 789-790, Dr. Braeutigam, supra)

Crude Helium Market

(See also Finding No. 19)

The other potential starting point for application of the work-back method is the crude helium market. It represents the first processing stage at which helium *per se* is freely marketed and the first form into which commingled helium is separated. The close proximity of the two stages makes work-back calculations easier and more reliable. During the relevant years, crude helium production was much more comparable in quantity to commingled helium production than was refined helium production, and all the helium at issue was sold and maintained in crude helium form. The crude helium market was by far the largest helium market existent during the pertinent ten year period. Beginning the work-back method here would allow us to make computations on the basis of events and transactions which actually occurred, and would minimize the need for speculation of the type refined helium figures require.

Supply and demand characteristics of the crude helium market were similar in size and structure to those which would have attended a commingled helium market if one had been independently identifiable, and the comparability of these economic factors makes comparisons between the commingled and crude stages much more realistic than comparisons with the refined stage.

Several factors made crude helium prices more representative of helium's fair market value at that level than pure helium prices were at the refined level. When the conservation program was initiated, a great many potential sellers received notice from the government of its intention to buy crude helium, and some 13 or 14 companies expressed interest in contracting as crude helium suppliers. The con-

tracts which finally emerged, including Phillips' contract, followed extensive "good faith" and "arm's length" negotiations. The price paid for crude helium to the "Helex" companies, including Phillips, averaged about $12 per Mcf. While the evidence reveals that the crude helium market was not a perfectly competitive market in the classical economic sense, throughout most of the relevant period there were at least four sellers in the market, dealing at prices freely negotiated, and substantial amounts of crude helium were exchanged within a fairly narrow range of prices.[10] This market was at least imperfectly competitive and significantly more competitive than the refined market. A rather well developed crude helium market existed, then, during the time period relevant here, generally operating within a price range of $11.00 to $14.00.

Phillips Contract Price

Since the evidence of both Ashland and defendant Phillips offers work-back calculations based on Phillips' actual extraction costs, employing Phillips' actual contract price as a starting value would be ideal if shown to repre-

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[10]"I think that to start with we have a market which I would not characterize at the crude level as being a perfectly competitive market, certainly, in the classical economic sense. However, we do have throughout most of the time period I'm talking about evidence that we had at least four sellers in that market, and they were entering into contracts at prices which were not dictated, either by the government or by anyone else. They were freely negotiated prices. I would characterize the market as perhaps imperfectly competitive. . . ." (Tr. 801, Dr. Braeutigam, supra)

"So with these exchanges and very very substantial amounts of crude helium being exchanged, within a fairly narrow range of prices, I think there is no question but what we had a very good market for crude helium existing." (Tr. 375-376, Dr. Leftwich, supra)

sent a fair and reasonable price for crude helium.[11] The Phillips contract was one of four negotiated with the four "Helex" companies and, like the others, resulted from extensive "arms length" negotiations. The court is now persuaded that Phillips' contract price of approximately $10.30 per Mcf represented a fundamentally fair and reasonable price for crude helium. This contrasts with the first trial, wherein the evidence demonstrated no relationship between the negotiated contract price and the fair market value of the helium. *See Ashland v. Phillips, supra* at 384.

Ashland's argument that the contract figure did not represent the full and complete helium "price," due to the contract's indemnity clause, is persuasive on its face but was shown at retrial to be factually unsound. At issue is contractual provision 7.4 of the Phillips contract, wherein the government agreed to indemnify Phillips for amounts in excess of $3.00 paid to third parties for their helium ownership rights. Such provision implies that the complete crude helium price was contemplated to be the base figure of approximately $10.30 plus additional payments required by third party ownership interests. The evidence now establishes that the base figure was considered by the parties to be the full and complete price for the crude helium and that it, in fact, constituted a fair and reasonable price. Phillips' negotiators had been advised by legal counsel that Phillips possessed sole and complete title to all of the contracted helium. Phillips was willing to so warrant its title and was intent on negotiating a contract

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[11] ". . . [S]ince the workback cost figures that are being used in this case are Phillips' cost figures, Phillips' workback cost figures, then it appears to me that they ought to be applied to a Phillips' price, rather than taking Phillips' cost figures and applying it to some nebulous overall price. If we are going to use Phillips' costs, let's use Phillips' price to do our workback." (Tr. 391, Dr. Leftwich, supra)

price reflecting the full and complete value of the crude helium. Approximately half of the helium Phillips contracted to sell was produced from its own gas wells and indisputably belonged to Phillips, and the base contract figure unquestionably represented full payment as to this one-half.[12] Significantly, the indemnification clause was never requested by Phillips, and was never a focal point of negotiations, but was merely inserted at the government's behest to provide continuity with previously negotiated contracts containing the same clause.

Ashland's contentions that the negotiated contract price was depressed by the potential threat of government condemnation of the helium is not supported by the record. The negotiated price essentially represented that dollar figure necessary to induce Phillips to bring forth the amount of crude helium the government wanted to purchase from Phillips.[13] Any evidence indicating a variance between the contract price and the helium's worth would seem to indicate that perhaps the price was slightly too high, since Phillips' bid was accepted for reasons influenced by conversation considerations even though slightly higher than one of its competitors.

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[12] ". . . [I]n the case of Phillips, one-half of its total crude sales to the government consisted of commingled gas that was not subject to the indemnity provision. And the price they sold that half at was no different than the price they sold the other half at, which did have something to do with the indemnity provision, which would suggest to me that they could not have given a great deal of weight to that provision in determining the negotiated price they settled on." (Tr. 423, Dr. Solomon, supra)

[13] "[The Phillips contract price] was a price that was necessary to induce Phillips to bring forth the amount of crude helium that the government wanted to purchase from Phillips." (Tr. 391, Dr. Leftwich, supra.)

Processing Costs

(See also Findings Nos. 25-31)

In computing a cost figure to be applied in the work-back method, this court was directed on remand to receive further evidence on, *inter alia,* the appropriate amount chargeable to costs as a return on investment and the amount of helium plant expense properly allocable to production of hydrocarbons and thus not properly chargeable to costs. Having determined that a 15 percent rate of return on investment is appropriate for reasons detailed in the court's attendant findings of fact, and having adjusted the cost figures to allow for hydrocarbon expenses, the court has examined computations based on crude helium values, including Phillips' contract price, in comparison with Phillips' actual costs. The court believes that the fair market value of Ashland's helium at the crude helium stage was in the vicinity of $10.50 to $12.00 per Mcf. Phillips' actual extraction costs during this period averaged out between $6.50 and $7.00 per Mcf. at Sherman, and slightly in excess of $10.00 per Mcf. at Dumas. Selecting a range of costs between $6.50 and $8.00 per Mcf. As being fair, the work-back method reveals that Ashland's recovery should be between $2.50 and $5.50 per Mcf.

Exact Computations

No automatic and exact solution to the problem of valuing commingled helium simplistically emerges from application of the work-back method to the relevant data. A rigid statistical approach preoccupied with mathematical precision would generate rather widely differing values for different "shipments" of commingled helium, depending upon the year of production and the processing plant

utilized.[14] Even then such precision could be attained only by delineating an artificially exact crude helium value as a starting point.

The exact contract price between Phillips and the government varied from year to year and plant to plant. The $10.30 price referred to earlier is less expressive of a precise crude helium value than it is of a figure located within a reasonable range of crude helium values. The work-back method reveals only that the commingled helium in this case should be valued somewhere between $2.50 and $5.50 per Mcf, depending upon the comparative weight assigned to the various relevant statistics.

Quantum Meruit

Recovery in this case rests upon the doctrine of "quantum meruit," wherein the law implies an agreement and allows recovery of "what is reasonable" and what one reasonably deserves" for benefits conferred in the absence of an express contract. *Brown v. Wrightsman,* 175 Okl. 189, 51 P.2d 761, 763 (1935). "Quantum meruit" applies where actual contractual intent and mutual assent by the parties is lacking; compensation is afforded based upon reason and justice. *Hillyer v. Pan American Petroleum Corporation,* 225 F.Supp. 425 (N.D.Okla.1963). This rule of law stresses the inequity of a party refusing to pay for benefits received knowingly and with consent, from someone lawfully authorized to expect remuneration therefor. *Kramer v. Wilson,* 226 S.W.2d 675 (Tex.Civ.App.1950); *Parks v. Kelley,* 147 S.W.2d 821 (Tex.Civ.App.1941).

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[14]Strict application of the work-back method would indicate that helium processed through the Sherman plant was worth $2.22 more at the wellhead than helium processed through the Dumas plant. (See Tr. 930. John C. Dunn, Economic and Financial Consultant)

Fair Market Value

(See also Findings Nos. 32-35)

The economic value of commingled helium is not as high as evidence at the first trial led the court to believe. It is not, on the other hand, inconsequential. The circuit court of appeals has correctly emphasized that helium has value by reason of its nature and usefulness, and that the government's conservation program may have preserved such value and made it available, but it did not create such. *Ashland v. Phillips, supra* at 389.

Significantly, however, the evidence at retrial established that helium's uses are limited and its demand is relatively small. This helium demand consistently has been dwarfed by the size of potential supplies. During the period of the helium conservation program and in the years immediately thereafter (1963-1977) only about 40 percent of the helium produced in helium-rich natural gas was recovered. Since the conservation program was completed, approximately 80 to 90 percent of the helium produced from the major helium-rich gas fields has been discarded at the wellhead and allowed to escape to the atmosphere due to the absence of a viable market.

Even in 1968, during the peak of the helium conservation program, 8.36 billion cubic feet of helium was produced in natural gas; but only 4.59 billion cubic feet was recovered. 3.77 billion cubic feet was vented into the air.

Over 188 billion cubic feet of commingled helium in proved probable reserves of helium-rich gas (containing 0.3 percent helium or more) had been identified as of 1977. An additional 171 billion cubic feet of helium commingled in reserves of less-rich natural gas (containing less than 0.3 percent helium) has been identified. This reserve

total of 359 billion cubic feet of commingled helium compares with helium consumption in 1977 totalling 0.9 billion cubic feet.[15]

The helium owners in this case were fortunate that their helium was selected to be conserved. Most of the nation's helium owners possessed no opportunity to sell at any price and received no compensation whatsoever for their helium. While plaintiffs are entitled to "reasonable compensation," this amount must fairly equate with the helium's "fair market value."

A market exists wherever two or more parties contact one another to engage an exchange, and where the parties agree on the terms thereof. The "fair market value" of an item is reflected in the price at which both buyers and sellers are willing to engage an exchange, and the price at which neither shortages nor surpluses will occur. It is the price at which sellers are induced to bring to market those quantities that buyers are willing to buy at that price. Normally, for a "market" and a "fair market value" to exist, the market price must be sufficient to cover costs of production and a normal profit to the sellers.[16]

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[15]United States Exhibit No. 28.

[16]". . . [A] market exists wherever two or more parties contact one another to engage an exchange, and where the parties agree on the terms of exchange." (Tr. 370, Dr. Leftwich, supra)

". . . [T]he market value of any item is reflected by the price at which both buyers and sellers are willing to exchange the item and a price at which neither shortages, nor surpluses, will occur.

Now, I would like to observe further here that the market value of an item is a price at which sellers are just induced to bring to market the quantities that buyers are willing to buy at that price. In other words, the value or the market price of an item must be sufficient to cover costs of production and a normal profit to the sellers, to the producers and the sellers.

The contract prices as a group that the conservation companies received from the government I think must be very close to a market value for crude helium. I think they must be very close to what a competitive price would be." (Tr. 376-377, Dr. Leftwich, supra)

Henry P. Wheeler, Jr., former Bureau of Mines employee in charge of the helium conservation program, and the government negotiator with the Helex companies, testified that the government could have purchased all of the commingled helium it desired for $2.00 per Mcf.[17] This analysis is generally supported by the record, including evidence of market conditions existent at the time.

In negotiating with Helex companies, government negotiations employed a "work-up" method to value the commingled helium. Similar in principle to the "work-back" method, this approach added cost increments to a selected wellhead starting value in order to arrive at the crude helium's reasonable value. This "work-up" method, whose results provided the bases for the resulting contracts, was predicated on the use of a $2.00 per Mcf value for helium at the wellhead. (See Phillips' Exhibit 71). Dr. Leo Garwin, plaintiff's own expert witness, recognized commingled helium's value during the years in question as being between $2.00 and $3.00.[18] Also, at least one 1966 sale between private parties utilized a $2.00 per Mcf price.[19]

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[17]". . . I would say that any application of any theory which comes out with an answer which is much different from $2, either plus or minus a little bit, there is something wrong with the method, because it does not adequately reflect the situation that existed at the time.

Q And why do you say that, sir?

A I was there, I knew what it cost to go out to get helium-bearing natural gas, and I know that I could have gotten all we wanted for $2, or less, and that's what it was worth." (Tr. 337-338, Wheeler, supra)

[18]Tr. 838-848. Dr. Leo Garwin, Consulting Engineer. See finding of fact No. 35.

[19]Q. "Now, did Kansas-Nebraska enter into an agreement with Cities Service . . . ?

A. Yes, sir, there is a – there is a provision in the processing agreement for a payment for the right to extract the helium.

Q. All right, sir. Do you recall what that payment–

Plaintiff's efforts to predict an eventual high economic value for helium possess little dependability or relevance to this case's issues. Estimates of future demand for most commodities, including helium, are less than reliable.[20] In any event, plaintiff's measure of recovery is tied to commingled helium's value as computed at the time of Phillips' sale. Speculation portends that exorbitant prices may eventually attach to such natural resources as land, water, wood and perhaps even clean air, yet their present economic value is governed by present availability rather than potential future scarcity.

A full and careful review of the record in this case reveals a myriad of considerations relevant to an ap-

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A. Yes, sir, its $2.00 per mcf.

Q. Of contained helium?

A. Yes, sir.

Q. Is that contained helium extracted?

A. Extracted, yes, sir.

Q. And can you tell the court generally how the $2.00 price was arrived at?

A. My memory is that at the time we were negotiating that arrangement with Cities, we only had one pattern to go by, which was a contract between Colorado Interstate and the government at the Keyes, that's K-e-y-e-s, plant, and that was $2.00. We were willing to accept that and Cities was willing to pay that, so that's what we arrived at.

Q. All right, sir. And do you recall about what year that would have been in?

A. I think that was probably about 1966, I guess."

(Tr. 14-15. Defendant Phillips' Exhibit No. 39. Deposition of S.D. Ford, Jr., vice president of production and gas supply with Kansas-Nebraska Natural Gas Company)

[20]"Estimates of the future demand of any commodity are notoriously unreliable and helium is no exception." (Plaintiff's Exhibit 2-31, p. 16, A Report to the President and the Congress of the United States on the Energy-Related Applications of Helium and Recommendations Concerning the Management of the Federal Helium Programs. See also Tr. 982)

propriate valuation of Ashland's helium commingled at the wellhead, none of which, however, individually establish an exact dollar figure. The full range of reasonable values disclosed by the proper application of "work-back methodology, the structure and salient economic factors of the various helium markets during the period in question, the expert testimony of record, and the equitable considerations collectively suggest that the reasonable value of the commingled helium in this case is between $2.00 and $3.00 per Mcf regardless of the year of production or the extraction plant utilized.

This determination, and the bases therefor, are hereinafter detailed.

In addition to the findings and conclusions in the preceding text, and by way of elaboration thereon, the court delineates the following:

Findings of Fact

Introduction

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest known element. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., *see Northern Natural Gas Co. v. Grounds, supra* and in the opinion of U.S. District Judge Wesley E. Brown, 292 F.Supp. 619 (D.C.Kan. 1968).

2. In the 1940's, the United States Bureau of Mines was the sole producer of helium in the nation, and it purchased commingled helium in the pipeline at the same price as the natural gas itself, ranging from 5 to 8 cents per Mcf.[21] In

[21]One Mcf is one thousand (1,000) cubic feet.

the late 1950's the Bureau of Mines purchased helium contained in natural gas in the pipeline for its Keyes plant operation at the price of approximately $2.00 per Mcf contained helium; the Bureau of Mines was willing to pay a premium price for the gas because of the high helium content (2.0 percent rather than 0.5 percent contained helium) which resulted in savings in production costs.

3. Pursuant to the authority granted by Congress in the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.), the United States entered into long-term crude helium purchase contracts with four companies, the "Helex" companies, to construct plants for the extraction of helium from natural gas streams being produced from the Hugoton-Panhandle area. Each of the contracts was executed on a different date, had three different initial unit prices per Mcf during each year of the contract for the life of the contract. The maximum annual obligation for each contract was different under the limitations imposed by Congress, i.e., only the sum of $47.5 million could be expended annually to buy helium under the Government's program to conserve helium. A summary of the contracts is set forth in Table 1 below:

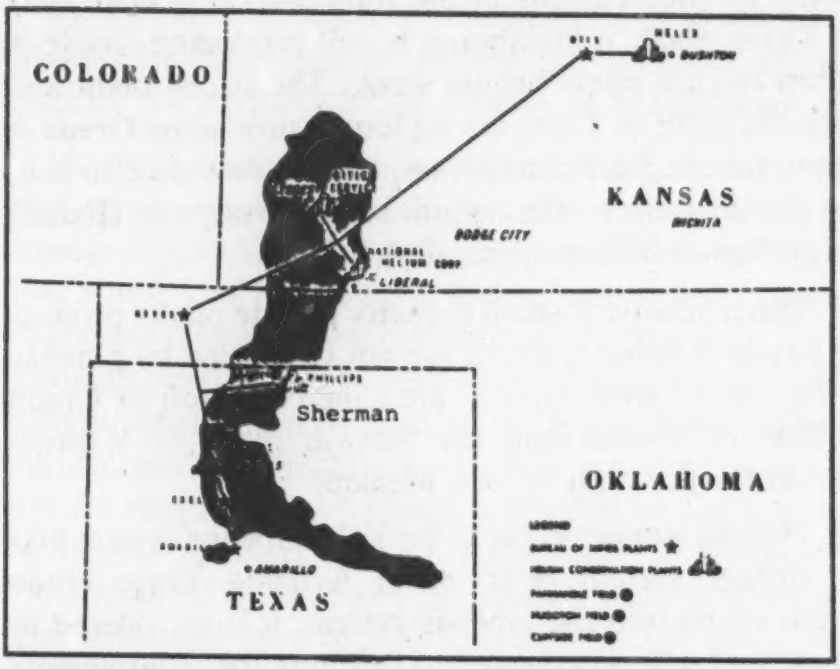
TABLE I

SUMMARY OF HELIUM CONSERVATION CONTRACTS

Company	Plant Location and Date of Contract	Initial Unit Price (for 1,000 cubic feet)	Maximum Annual Obligation (million dollars)	Estimated Helium Volume (million cubic feet) Annual Average	Life of Contract
Northern Helex Company	Bushton, Kansas 8-15-61	$11.24	$9.5	675	13,500
Cities Service Helex, Inc.	Ulysses, Kansas 8-22-61	11.78	9.1	610	12,200
National Helium Corp.	Liberal, Kansas 10-31-61	11.78	15.2	1,053	21,060
Phillips Petroleum Company	Dumas, Texas) and) Sherman Co.,) Texas 11-13-61	2 plants 10.30	13.5	788	15,766
Weighted average – $11.29					
TOTAL			$47.5	3,126	62,526

4. In addition to Phillips Petroleum Company, the last of the Helex companies to enter into a conservation contract with the United States, agreements for the purchasse of crude helium were reached with National Helium Corp., Cities Service Helex, Inc., and the Helex Company (later Northern Helex Company).

5. The crude helium conservation system consists of 5 privately owned crude helium production plants, a main pipeline running from Bushtown Plant in Kansas to the storage site at the Cliffside field in Texas and lateral pipelines running from the main pipeline to certain Grade A helium production plants. Three of the conservation plants are located in Kansas: the Bushtown Plant of Northern Helex, the Jay Haw Plant of City Service Helex and the Liberal Plants of National Helium. The plants at Sherman and Dumas, Texas, belong to Phillips Petroleum.



ESSENTIAL LINK in the nation's helium conservation program is a 353-mile pipeline constructed by the federal government in 1962 and connecting five privately owned and four government-operated extraction plants to an underground storage area in the Cliffside field near Amarillo, Tex.

6. Under the terms of its contract of November 13, 1961, Phillips agreed to sell the United States a helium gas mixture from two plants it proposed to build at Sherman and Dumas, Texas. The plants were constructed to extract for delivery and sale to the government, per the contractual terms, a helium gas mixture (crude helium) of at least 50 percent helium, with the remainder being essentially nitrogen. The nominal capacity for production of crude helium for the Sherman and Dumas plants was 360,000 Mcf per year and 428,000 Mcf per year, respectively. Production began at the Sherman plant in December, 1962, and at the Dumas plant in April, 1963.

7. Three private plants which in 1978 were producing Grade A helium from crude helium, are connected to the helium conservation system by way of private pipelines. These are the plants of Kansas Refined Helium Company, City Service Cryogenics and the Alamo Chemical and

Gardener Cryogenics plants, all in Kansas. Of the three Bureau of Mines plants in the conservation system, only the Keyes plant in Oklahoma is still producing Grade A helium from a crude helium stock. The Excell plant and Amarillo plant in Texas are no longer producing Grade A helium for the Bureau of Mines, but are now used to control the pressure in the helium storage reservoir (Excell) and to liquify helium (Amarillo).

8. Other relatively small capacity private plants producing Grade A helium, which are not connected by pipeline to the conservation system, are Linde Division of Union Carbide in Kansas and the Navajo plant of Western Helium Corporation in New Mexico.

9. Helium storage exists in both the pipeline system and the storage system reservoir at Ciffside. Once crude helium enters into the pipeline system, it is considered in storage and unless dedicated to fulfilling the requirements of the conservation contract is freely transferable from the Helex Company plant owners to the owners of the private Grade A helium producing plants.

10. A total of 33,760,506 Mcf of crude helium was acquired by the United States under the conservation program. Under the contracts, this helium was priced at $405,049,136.89, an average price of $12.03 per Mcf as shown in Table 2 below:

TABLE 2

HELIUM CONSERVATION CONTRACTS SUMMARY

Company	Amount $	Volume Mcf	Average Price $/Mcf
Northern Helex Co.	$ 51,864,201.12	4,475,921	$11.5874
Cities Service Helex, Inc.	84,719,570.87	6,720,927	12.6053
National Helium Corp.	154,775,285.89	12,217,628	12.6682
Phillips Petroleum Co.	113,690,079.01	10,256,030	11.0852
TOTAL	$405,049,136.89	33,670,506	$12.0298

11. Of these amounts, Phillips conveyed to the United States 10,256,030 Mcf of helium, priced under the contract at $113,690,079.01, an average of $11.0852 per Mcf.

12. At the time of termination in 1973, the government had approximately 35 billion cubic feet of helium in storage in the Cliffside Field in Texas, and it was estimated that about four billion cubic feet of helium was contained in the government-owned native gas in that field. It was also estimated that approximately 5.5 billion cubic feet of helium would be recovered in the Keyes plant under its natural gas supply agreement. This assured the government a supply of 44.5 billion cubic feet of helium. As a result, the Secretary of the Interior found on February 2, 1973, that the objective of the Helium Act had been met. The objectives were to

> "foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits. . . a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities." 50 U.S.C. § 167m.

13. Approximately 42.8 billion cubic feet of helium is presently stored in Cliffside. Of this 42.8 billion, 32.2 billion was purchased under the helium conservation contracts; 1.5 billion was accepted in storage under court order; 3.5 billion was produced at Bureau of Mines plants; and 4.0 billion is contained in native gas. All of the approximately 34 billion cubic feet of helium acquired under the conservation program remains in storage at Cliffside. Assuming that the 34 billion cubic feet obtained from the conservation companies was worth $10 per Mcf, the government has an investment in the helium stored at Cliffside of $340 million. Assuming, again, that the invested

money could draw 10 percent interest a year if properly invested, the United States is paying at least $34 million a year in interest to keep the helium in storage. The storage cost is about the largest cost item associated with the helium acquired under the conservation program.

Refined Helium Market

14. No relationship exists between Grade A helium prices and either the crude helium sold by Phillips to the United States or the crude helium sold to the United States pursuant to any other conservation contracts. All such crude helium was placed in underground storage by the government and so remains. None has been refined into Grade A helium. It was not produced to supply current demands, but was produced to be saved and not wasted when the helium-bearing natural gas went to market. It is not known when the stored crude helium will be used; the purpose for which it will be used; nor the price at which it will be sold.

15. During the ten years involved in this case, approximately 92 billion cubic feet of helium was produced at the wellhead; 48 billion cubic feet of helium was not recovered, but instead was wasted into the atmosphere as the natural gas containing such helium was marketed. 44 billion cubic feet of helium was recovered in the United States, all of which was initially recovered as crude helium. Of this amount, 36 billion cubic feet was placed in underground storage by the government and remains there at this time. Of this 36 billion cubic feet in storage, 34 billion cubic feet represents all the crude helium sold by Phillips and the other conservation companies to the government. Of the 44 billion cubic feet of helium extracted and saved, only 8 billion cubic feet was refined into

Grade A helium and only approximately 3.3 billion cubic feet was sold to private customers during the years in question. It is now clear that it would be improper to attempt to value the 34 billion cubic feet of conservation crude helium in storage by any price the 3.3 billion cubic feet of refined helium may have sold for. To do so would require the assumption that all of the 34 billion cubic feet of stored crude helium could have been refined and sold in the Grade A market. It is clear that such could not have been done without drastically reducing the price of Grade A helium.

16. The prices paid for Grade A helium during 1963 through 1972 are not sufficiently reliable as indications of value to serve as a starting point. It is uncontroverted that the government's 1961 price of $35.00 was adopted for the express purpose of creating sufficient income from government sales of refined helium to pay Phillips and the other conservation companies for the crude helium they were selling the government for storage, as well as to pay all other expenses associated with the storage program. Previous to that price, the government was selling Grade A helium to government users at $15.50 per Mcf and to private users at $19.00 per Mcf. The $35.00 price was never intended to represent a fair market value for helium. Nonetheless, the $35.00 price was the only price available during all of 1963, 1964, 1965 and a substantial portion of 1966. During those years there was only one other seller of Grade A helium (Kerr McGee), and one of Ashland's witnesses, then an employee of Kerr McGee, affirmed that Kerr McGee purposely fixed its price to be equal to the posted government prices – whatever they might be – so that whatever the government price was, the Kerr McGee price was also. The helium the government sold during the ten years involved herein was produced by the government itself and was not purchased from the Helex companies.

17. After 1966 there was little stability of Grade A prices. Although Grade A helium producers began operations in 1966 through 1968 and the prices which they charged were significantly less than $35.00 per Mcf, there was no particular proximity of prices. One seller of Grade A helium in 1966 (Kansas Refined Helium) sold its product for an average price of $16.37 per Mcf and in 1967 for $17.68 per Mcf. At the same time other sellers in 1967 were selling the same product for $25.57 and $35.00 per Mcf. A former Kerr McGee employee testified that he was personally familiar with an attempt to sell Grade A helium at $15.00 per Mcf in 1967. Weighted average Grade A helium prices charged by private parties f.o.b. the plant decreased from $25.39 per Mcf in 1966 to $20.21 in 1972, although Kerr McGee reduced its posted price to $19.00 in 1969 and maintained such until April 25, 1972.

18. During the 1962-1972 period the volume of Grade A refined helium sales varied substantially; sales of 611,000 Mcf in 1962 rose to 929,000 Mcf in 1969 and then steadily fell to 580,000 Mcf in 1972. As private companies began producing Grade A helium, the government's share of the commercial market continuously decreased from a high of about 135,600 Mcf in 1962 to a low of 6,279 Mcf in 1972.

Crude Helium Market

19. There is now, and was at all times since the commencement of the conservation contracts, a market for crude helium. This market consists of all crude helium sold to the government for storage purposes under the Helium Conservation Act, as well as all sales and purchases between private parties, all within a fairly narrow range of prices. Phillips' Exhibits 43, 44 and 45 describe the details of very substantial crude helium exchanges. Exhibit 43 reflects that the government purchased, between

1963 and 1972, approximately 31,400,000 Mcf of contained helium. Private parties exchanged more than 675,000 Mcf in just slightly more than six years beginning in late 1966 and ending in 1972, and approximately 686,000 Mcf in the three years thereafter. The crude helium market was by far the largest helium market in existence during the ten years herein. Numerous witnesses, including representatives of many of the purchasers and sellers of crude helium, testified that a well defined market for crude helium existed. The president of National Helium stated that a crude helium market existed and continues to exist, as did the vice president of Northern Helex. Similar expressions were received from representatives of Cities Service and Kansas Refined Helium, crude helium's largest private purchaser. Each testified extensively regarding the circumstances of each sale, the volumes sold, the prices received and the contract terms generally.

Phillips Contract Price

20. In the original trial of this case very little evidence was offered describing the negotiations which led to the contracts above-mentioned and, particularly, to the contract of November 13, 1961, between Phillips and the United States, and no relationship between the contract prices and any then existing markets or market values was developed of record. Credible written and oral evidence of these matters is now before the court.

21. As previously mentioned, the Phillips contract, which was the last of the four contracts to be negotiated with the Helex companies, resulted from intense negotiations between Mr. Henry Wheeler, the former Director of the Helium Conservation Program, representing the United States, and officials of Phillips Petroleum Company. Funds were available for only one more conserva-

tion contract with a crude helium producing company; and two companies, Phillips and Colorado Interstate, were both interested in acquiring a government contract. During negotiations with Phillips, Mr. Wheeler negotiated the price downward to $10.30 Mcf. Meanwhile, Colorado Interstate had offered to convey crude helium to the government at a price of $10.10 per Mcf. Despite the small price advantage offered by Colorado Interstate, Mr. Wheeler selected Phillips Petroleum because by doing so a greater volume of helium would be conserved.

22. Article 7.4 of the Phillips' contract provided that the United States would indemnify Phillips for any amount over approximately $3.00 per Mcf which Phillips might be required to pay third parties for acquisition of the commingled helium. Phillips had not requested that this indemnification be placed in the contract. Mr. Henry Wheeler testified that the clause was included so that the government would be treating all of the contractors alike. The testimony of Mr. Wheeler and Mr. Cullender, a member of the Phillips team that negotiated the contract, and the deposition of Mr. Wilson, the negotiator for National Helium, all established that Article 7.4 had no influence whatsoever on the price the United States paid for crude helium. The evidence reflects that Phillips believed it had title to the helium when it entered into the contract, that it did not request the indemnity provision, and in fact, did not consider its effect.[22]

Originally, Phillips had submitted a written proposal of $11.48 per Mcf wherein it offered to warrant its title. The

[22]In any event, more than one-half of the helium sold by Phillips to the government was not covered by Article 7.4 for it was produced from Phillips' own gas wells. Since paragraph 7.4 is irrelevant as to Phillips owned gas, the sale of helium produced by Phillips from its own wells represents a substantial comparable sale which clearly supports the use of Phillips' contract price as the starting value.

government rejected such offer because it thought the price too high. The government countered with its own proposed contract, suggesting a figure of approximately $10.30 per Mcf. Such proposal contained no provision for title warranty by Phillips, but instead included the government indemnity clause discussed earlier. Neither side's actions evidenced a belief that the title question raised any issue of serious economic import.

23. The $10.30 price in the Phillips contract, adjusted only by the price index provision in paragraph 7.3, was deemed by both Phillips and the government as the complete price and value of the crude helium. The indemnity provision was not deemed or intended by either as part of the purchase price. Similarly, the National Helium negotiator testified that in his opinion the contract price agreed between the government and National Helium was exactly representative of the crude helium's value at the time of the execution of the contract.

In addition, the United States' power of condemnation does not appear to have been a factor in the negotiation of the conservation contracts, since use of such power was neither threatened nor suggested. Phillips' concern was not that the United States would seek to condemn the helium, but, rather, that the United States would enter into a contract with some other party for the purchase of crude helium and thereby deny Phillips the opportunity to sell its helium to the United States.

24. As noted above, in 1966 several sales of substantial quantities of crude helium occurred between private parties, and sales continued to be made during all the years in question. In all instances the sellers sold the crude helium for prices comparable to those set forth in the conservation contracts and at least four substantial sales between 1967 and 1972 involved full title warranty by the seller.

These sales with full title warranty strongly indicate that the conservation contract prices were not unduly low and were not forced downward by the presence of the indemnification clauses. The indemnification clauses caused no one to undervalue the helium.

Processing Cost

25. Effective application of the work-back method requires that the proper costs be deducted from the proper starting value. In this case the relevant costs are all helium plant expenses allocable to helium production, plus an appropriate return on the amount of capital employed in such production.

26. Disputes between the parties on "cost" issues include disagreements as to the amount of plant expenses allocable to helium, the amount of capital allocable to helium, the rate of return to be allowed and whether in calculating this rate of return there should be included a sum sufficient to cover income taxes.

27. Phillips' accounting witness utilized essentially the same "capital employed" and plant expenses used by Ashland's accounting witness but made certain adjustments thereto. These adjustments to "capital employed" entailed:

(a) an increase in the amount of working capital based on Phillips' actual working capital;

(b) provision of a return on deferred testing (start up) costs which were amortized over the life of the contract;

(c) inclusion of accounts receivable Phillips was required to finance and for which there was no provision for interest.

These changes reflect an accurate and appropriate approach in this case for computing "capital employed."

Ashland has never complained that Phillips was an inefficient helium extractor and in fact the evidence is quite to the contrary. Therefore, there is no justification for plaintiff's suggested approach of using Phillips' actual costs in some instances, while applying a formula for determining working capital when Phillips' actual working capital appears to plaintiff to be larger than needed.

28. Determination of the return rate properly allowable to Phillips involves ascertainment of the return rate necessary at the time to induce Phillips' management to make the initial investment. Each of the experts testifying on the return issue for Phillips and the government was actually engaged during the period in question in the investment decision-making process of substantial corporations, and each testified that the minimum rate of return necessary to have caused a knowledgeable investor to make the investment made by Phillips was 15 percent after taxes. The testimony of Phillips' employees fully supports this conclusion.

The court finds that the prospect of a 15 percent after-tax return was required to induce Phillips or any other knowledgeable investor to enter into the contract involved here. Phillips' helium plant costs should, therefore, include such a return.

29. To effect the appropriate after-tax return, monies paid in income taxes should be included as a cost item. Failure to include income taxes would, under the work-back method of valuation, place too high a value on the helium at the wellhead.

30. The issue of expenses properly allocable to hydrocarbon production results from the fact that helium plant operations concentrate liquefiable hydrocarbons contained in the natural gas processed at the helium plants. These concentrated liquefiable hydrocarbons leave the

helium plant in what is termed the "rich gas stream," which then enters a gasoline plant where further processing and extraction of liquefiable hydrocarbons occurs. The efficiency of the gasoline plant is improved by the helium plant's concentration of the liquefiable hydrocarbons.[23]

31. The court finds that allocation of helium plant expenses to the production of hydrocarbons should be based on the "functional cost benefit method" proposed by Phillips. Helium plant investment and expenses should be allocated between crude helium production and production of the rich gas stream. Phillips' method of allocation results in an allocation of helium plant costs on an equitable basis and in a logical manner. The incremental liquids credit proposed by Ashland is subject to various compelling criticisms, both as to the basis for its calculations and its potentially inequitable results.

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[23]Ashland contends that the net value of the additional liquids (called incremental liquids by Ashland) should be used under the by-product cost accounting method to reduce the cost of helium extraction. On its exhibits Ashland adds the net value of these incremental liquids to the wellhead value of the helium but the effect is the same as subtracting these net liquid values from the cost of helium extraction before determining the wellhead value of the helium. Phillips contends that Ashland has not properly calculated the volume of what it calls incremental liquids in that the base period selected by Ashland does not actually reflect what the liquid recovery would have been in succeeding years had the helium plants not been built and that Ashland has been arbitrary in its determination of the incremental liquids inasmuch as it has failed to take into account the fact that processing the natural gas through the helium plants actually caused a reduction in the recovery of the most valuable of these liquid products. Phillips contends that Ashland has already received the benefit of Phillips' cost savings and that no allocation of expenses to hydrocarbon production is necessary. Furthermore, Phillips contends that if an allocation of helium plant expenses to the production of hydrocarbons must be made, then the allocation should be made on the basis of a functional benefit cost study.

Fair Market Value

32. In 1977, of the total 6.92 billion cubic feet of commingled helium produced, a mere 1.38 billion cubic feet was recovered. This small recovery results from helium's market demand being tremendously overmatched by available supplies. For example, even though cheap storage of helium is available at Cliffside, Cities Service Helex, one of the companies with the existing capacity to recover helium, is simply venting it to the atmosphere despite being connected to the conservation system. Neither the National Helium plant at Liberal nor the Phillips-Dumas plant are producing crude helium for storage.

33. In excess of 188 billion cubic feet of contained helium in proved or probable reserves of helium-rich gas (containing 0.3 percent helium or more) had been identified as of 1977. Of that 188 billion cubic feet, 105 billion cubic feet is in non-depleting reserves, i.e., it is either in storage at Cliffside or is contained in natural gas of a low heating value which is not being produced.

34. A $2.00 per Mcf price for commingled helium was used by the Bureau of Mines in computing the price it was willing to pay under the helium conservation program. The four Helex companies in good faith believed that they owned the helium contained in the natural gas and accepted $2.00 per Mcf as the value of the commingled helium.

35. Dr. Leo Garwin, witness for Ashland, authored an article published in the April, 1969, issue of "Hydrocarbon Processing," wherein he stated that the helium content in natural gas "is normally worth between $2.00 and $3.00 per Mcf." Similarly, in a letter dated September 12, 1969, to the Chairman of the House Committee on Interior and In-

sular Affairs, Dr. Garwin referred to the value of helium contained in natural gas as $2.00 to $3.00 per Mcf; and in 1967 Dr. Garwin testified on behalf of Ashland at an arbitration proceeding that the value of helium contained in natural gas owned by Ashland was $2.35 per Mcf.[24]

Conclusions of Law

1. This court's responsibilities and duties on remand are set forth in the appellate opinion in this case rendered subsequent to the first trial. *Ashland v. Phillips,* 554 F.2d 381 (10th Cir. 1975).

2. Ashland's suit for the reasonable value of the helium in controversy here is, in effect, an action in quantum meruit. *See Phillips Petroleum Co. v. Texaco, Inc.* 415 U.S. 125, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974).

3. The court of Civil Appeals for the State of Texas, the state where this action was commenced, has observed:

> "quantum meruit, [is] a creature of equity, . . ." *University State Bank v. Gifford-Mill Const. Corp.,* 431 S.W.2d 561 (Tex.Civ.App.1968).

That court has further held that quantum meruit actions "rest their holdings upon equity and justice" and that recoveries thereunder require "equity and justice." *Ochiltree County v. Hedrick,* 366 S.W.2d 866 (Tex. Civ.App.1963).

4. Strict adherence to exact mathematical formulations which fail to encompass the equities in this case is inappropriate. The Court must seek equity and justice for all parties.

5. For example, the wellhead values for helium extracted at the two plants for the years 1963-1971 vary from

[24]Tr. 838-848; United States Exhibit Nos. 36,37; Dr. Garwin, supra.

a minus $.40 per Mcf to $5.34 per Mcf of helium. Additionally, the values of helium vary from plant to plant for exactly the same year; the value of the helium extracted from the Sherman plant in 1968 was $4.34 and the value of helium extracted from the Dumas plant for the same year is $.41 per Mcf. The court believes this clearly illustrates that rigid application of mathematical calculations under the work-back method would render fractured and inequitable results.

6. Equitable considerations indicate that a single uniform value for commingled helium should be applied to all of the helium extracted at both the Sherman and Dumas plants for each year.

7. The reasonable value of the helium commingled at the wellhead should be the sum that would have resulted from fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Standard Oil Company v. Southern Pacific Company,* 268 U.S. 146 at 155, 45 S.Ct. 465, 69 L.Ed.890 (1925).

8. Based upon all of the oral and documentary evidence presented by the parties during this trial and the first trial, the court concludes that the reasonable value of the commingled helium is $3.00 per Mcf of contained helium for each and every year that helium was produced, regardless of the plant from which it was produced.

9. Plaintiff Ashland is entitled to judgment against defendant Phillips as to the 72,748 Mcf of contained helium at issue in this case, in the amount of $218,244.00.

10. Generally, interest is awarded only where the amount involved is liquidated. *Palmer v. Radio Corporation of America,* 453 F.2d 1133 at 1140 (5th Cir. 1971). Previous to judgment herein, the amount owed Ashland has remained unliquidated. Phillips asserted a good faith

and persuasive title claim to the commingled helium previous to the opinion in *Northern Natural Gas Company v. Grounds, supra.* Subsequently, the helium's value has remained very much in dispute.

Ashland is entitled to interest as of the judgment date herein, as provided by law.

An appropriate judgment will be entered herein.

APPENDIX D

United States Court of Appeals
Tenth Circuit

Nos. 79-1009, 79-1096, 79-1108
(Consolidated)

ASHLAND OIL, INC.,
Plaintiff-Appellant,
Cross-Appellee,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee,
Cross-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee,
Cross-Appellant.

Appeals From The
United States District Court
For The Northern District Of Oklahoma
(D.C. # 67-C-238)

(Filed October 15, 1979)

Gerald Sawatzky, Wichita, Kansas (John M. Imel, Arloe W. Mayne, Lillian Williams, W.O. Strong III, and of counsel, Foulston, Siefkin, Powers & Eberhardt, Fulbright & Jaworski, and Moyers, Martin, Conway,

Santee & Imel, on the brief), for Plaintiff-Appellant, Cross-Appellee.

Don L. Jemison, Bartlesville, Oklahoma, and L.K. Smith, of Boone, Ellison & Smith, Tulsa, Oklahoma (Kenneth Heady and C.J. Roberts, on the brief), for Defendant-Appellee, Cross-Appellant.

John E. Lindskold, Department of Justice, Washington, D.C., for Intervenor-Appellee, Cross-Appellant.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

Per Curiam.

This case was remanded for the development of additional facts relating to and to provide a basis for the valuation of the helium at the wellhead by the use of a work-back method. *See* Ashland Oil, Inc. v. Phillips Petroleum Company, 554 F.2d 381 (10th Cir.). The trial court was to determine a proper starting place and value for such method, the plant cost, return on investment, the costs chargeable to production of liquid hydrocarbons, and related facts.

On remand the trial court selected as a starting point the stated value of helium used in the contract between Phillips and the Government. For a brief description of the contract, see 554 F.2d, at 384. This determination by the court was based on the expert testimony relating to pure helium values and other possible starting points for the valuation of helium. A starting place for the work-back method can be at any point in the production-processing-sale chain where a dollar figure can be established by reliable evidence, and which may be

demonstrated to be a realistic value. We see no objection to the use of the contract value for this purpose. It was a negotiated figure arrived at by parties dealing at arm's length. There may have been other considerations involved, but on remand these do not appear to have been substantial enough to cast doubt for our purposes on the contract price. This figure was not greatly different from those used in the contracts for other extraction plants.

Using this figure the trial court made findings as to plant investment and rate of return. These factual determinations were made after a consideration of the testimony and are supported by the record. The appellant urges that there are factors which should not have been included in the plant cost figure or in the total "capital employed" upon which Phillips was entitled to compute a return. However, again this was a fact-finding element, and the result was supported by the record.

The parties are in essential agreement as to the costs to be allocated to the production of liquid hydrocarbons. The trial court's figure on this element must be accepted.

The rate of return is a departure from the figure used at the first trial, but this element was included in the remand and again is supported by the testimony of the several witnesses. It is within the fact-finding function of the district court. On the prior appeal we expressly approved the award of prejudgment interest. This factor was not in the remand and became the law of the case. Thus, as we previously held, plaintiff is entitled to prejudgment interest.

The plaintiff urges that postjudgment interest should commence upon the date of the first judgment and not at the end of the remand trial. However, we must hold under 28 U.S.C. § 1961, in view of the extent to which the case

was reversed, "the judgment" for the purpose of interest was that entered by the trial court on remand. *See* Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir.).

The judgment is affirmed as to the three dollar value at wellhead for the helium, but is reversed as to prejudgment interest and remanded for the entry of a judgment to include such interest.

APPENDIX E

United States Court of Appeals
For the Tenth Circuit

September Term – October 15, 1979

Before Honorable Oliver SETH, Chief Judge, Honorable James E. BARRETT and Honorable William E. DOYLE, Circuit Judges

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Nos. 79-1009
79-1096
79-1108
(D.C. No. 67-C-238)

ASHLAND OIL, INC.,
Plaintiff-Appellant-Cross-Appellee,

v.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee-Cross-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee-Cross-Appellant.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed as to the three dollar value at wellhead for the helium, but is reversed as to prejudgment interest. The cause is remanded to the United States District Court for the Northern District of Oklahoma for the entry of a judgment to include such interest.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX F

United States Court of Appeals
For the Tenth Circuit

September Term – November 14, 1979

Before Honorable Oliver SETH, Chief Judge, Honorable Robert H. MCWILLIAMS, Honorable James E. BARRETT, Honorable William E. DOYLE, Honorable Monroe C. MCKAY and Honorable James K. LOGAN, Circuit Judges

---

Nos. 79-1009
79-1096
79-1108

ASHLAND OIL, INC.,
Plaintiff-Appellant-Cross-Appellee,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant-Appellee-Cross-Appellant,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee-Cross-Appellant.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant, Ashland Oil, Inc., in the captioned causes.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth, Circuit Judges Barrett and Doyle, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Circuit Judge Holloway did not participate in the consideration of the suggestion for rehearing en banc.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

In the Supreme Court of the United States

October Term, 1979

No. 79-1250

Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR., CLERK

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

October Term, 1979

No. 79-1250

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions delivered in the courts below (A. 91a, 54a) are reported in 607 F.2d 335 (10th Cir., 1979), and 463 F.Supp. 619 (N.D. Okla., 1978). These proceedings, however, did not involve the question presented by petitioner, but rather followed an earlier partial affirmance and remand on other points (A. 20a) reported in 554 F.2d 381 (10th Cir., 1977), cert. denied, 434 U.S. 921, 968, which was a review of the initial 1973 district court decision (A. 1a) reported at 364 F.Supp. 6 (N.D. Okla., 1973). These earlier decisions, in turn, simply followed the definitive holding of a related case, *Northern Natural Gas Co. v. Grounds,* 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063, to which both petitioner and respondent were parties.

The latter decision is not reproduced in the Appendix to the Petition.

QUESTION PRESENTED

Should this Court review the determination made in *Northern Natural Gas Co. v. Grounds,* 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063, that a helium extractor's payment to the gas producer of a rate for natural gas, filed with and approved by the Federal Power Commission as authorized by the Natural Gas Act, was not a payment for helium commingled in the natural gas, when:

(a) Section 11 of the Helium Act provides that rates authorized by the Natural Gas Act are not applicable to helium commingled in the natural gas;

(b) This Court denied certiorari in *Grounds* on January 24, 1972, on two petitions raising the same arguments; and later denied separate petitions for certiorari by petitioner and the United States raising the same contentions as to an earlier decision in this case, 554 F.2d 381, cert. denied, 434 U.S. 921, 968 (1977); and

(c) The decision in *Grounds* was demonstrably correct, and has been approved by all judges of the Tenth Circuit without dissent?

STATUTES INVOLVED

Subsections (a), (b), and (c) of Section 4 of the Natural Gas Act, 52 Stat. 82, 76 Stat. 72, 15 U.S.C. §717c; and Section 11 of the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. §167i, are reprinted in the Appendix to this brief, *infra*.

STATEMENT

This fifth petition for a writ of certiorari filed since 1971, by parties required to pay for the rare commodity, helium, obtained by them from producers such as Ashland who supply it, presents the same spurious argument made in each of the previous four petitions. Two of the petitions were filed by petitioner and the United States seeking review of the 1977 *en banc* decision by the court of appeals in this case.

The other two petitions were filed in 1971 by other helium extractors seeking review of *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir.), cert. denied, 404 U.S. 1063, which completely disposed of the issue of liability for helium payment, and remanded to the district court solely to ascertain the value of the helium for which judgment should be entered. Both Phillips and Ashland were named parties to those class actions in one capacity or another, taking opposing sides on the liability phase.

Thus, although the liability judgment was "interlocutory" in the sense that the amount of recovery was not fixed, the liability was "final" so far as the Tenth Circuit was concerned. The lengthy district court trial on the liability phase had been completed in 1968, and only the valuation, or damage, phase had been reserved.[1] There was no reason, flowing from the remand of the damage phase, to defer potential review by this Court of the liability phase, as each of the petitions made clear. There was

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1. The liability phase consumed 40 days of trial, and included 1,611 exhibits. The index to the record on appeal was itself 234 legal size pages in length.

A judgment following trial and appeal of the severed liability phase, which remands only the valuation phase, is considered to be "final" in later appeals from the valuation proceedings. *U.S. v. Turtle Mtn. Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. Cl. 1979).

no basis suggested by any party for deferring review until a later "final" judgment fixing the amount of recovery. The remand of the damage phase, therefore, was unlike those cases in which a remand for further district court findings may affect the issue sought to be reviewed, or additional trial affecting the issue is ordered, as in *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), cited by petitioner, pp. 20-21.

Since this Court's denial of the two petitions in *Grounds* in January, 1972, the following protracted proceedings on the valuation, or damage, phase have ensued:

1973—Discovery and trial in the Northern District of Oklahoma in this case.

1974—Appellate proceedings on appeals from the Oklahoma case; Discovery and trial in the District of Kansas in the *Grounds* case.

1975—Decision of a Tenth Circuit panel affirming the valuation issue in the Oklahoma case, in which appeals all parties to the Kansas case had participated as *amici curiae*.

1976—Appellate proceedings on appeals from the *Grounds* case; heard by the court *en banc*, consolidated with a rehearing *en banc* granted in this case.

1977—*En banc* decision on rehearing affirming the major aspects of the "work-back" valuation method applied by the district court in its 1973 decision in this case, but remanding limited issues for further evidence.

Certiorari petitions filed by Phillips and by the United States were denied.

1978—Trial on remanded issues in this case in the Northern District of Oklahoma, after which the district court held that its prior 1973 rejection of the base contract price as an element of the valuation was "erroneous" although the appellate court had affirmed that aspect of its prior decision.

1979—Appellate proceedings, and decision affirming the district court's $3 per m.c.f. value, as had been advocated by the single dissent on the valuation question in the 1977 *en banc* decision. The appellate court declined to apply the law of the case decided in 1977 by ignoring, in its summary opinion, Ashland's principal point on the appeal.

There remains, we trust, a strong public policy supporting finality in judicial proceedings, a policy designed to minimize delay; to promote economy in time, expense and effort by preventing relitigation of decided issues and by bringing litigation to prompt, final conclusion. Since Ashland had already expended far more costs in the proceedings below in this case than the amount of its reduced judgment as approved by the court of appeals, the principle of finality is of more than academic interest to it, as noted in more detail in its own petition to this Court in No. 79-1241.

On this ground alone, Phillips' petition should be denied.[2]

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2. After denial of its last petition (No. 77-221) seeking review of the 1977 *en banc* decision, the judgment affirming Phillips' liability was entered in the district court. Phillips did not there renew any claim of nonliability, did not claim it as an issue in the pretrial order, and admitted liability in its requested findings and conclusions. (RII, Vol. I, 62-103). It

(Continued on following page)

Historical Background—Legislative History

In 1945 and 1953 Ashland's predecessor contracted to sell natural gas from various Texas gas wells to Phillips. The contracts were entered into by Phillips so that it could resell the gas, and gas from many other wells, to Michigan Wisconsin Pipe Line Company. At those dates, no federal price regulation affected those sales or resales. Gas from the Ashland wells was to escalate in price, under the contract provisions, with the expected rise in the unregulated price of Phillips' resales to Michigan Wisconsin.

In *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672 (1954), Phillips' resales of this gas were held subject to price regulation under the Natural Gas Act, as were all producer sales for resale in interstate commerce, including the sales from Ashland wells. The ensuing FPC rate regulation directly limited the rates received by Phillips from Michigan Wisconsin, and thus the rates for the sale of natural gas by Ashland to Phillips.

During the middle and late 1950's, coincident with the technological explosion in science and industry, demand for helium rose spectacularly for numerous indispensable civilian and military uses. Ninety-nine percent of the

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Footnote continued—

[illegible] a general appeal from the money judgment, which judgment was in an amount substantially less than it had admitted was due (RII, Vol. I, 81-82), and first sought to renew the liability issue on appeal by a short statement in its appellate brief, but did not orally argue it. Only Ashland sought rehearing of the appellate decision approving the drastic reduction in its judgment, occasioned by a departure from the earlier decisions in its favor on the valuation issue. Phillips relies on Ashland's petition for rehearing affecting only the valuation issue to extend its time for filing its present petition in this Court. If jurisdiction of Phillips' petition exists here, under that record, it rests on very thin ice.

Citations "RI" and "RII" are to the printed Appendices in the court of appeals for the original 1973 trial, and 1978 evidentiary hearing, respectively.

free world's native helium resources were contained in the Hugoton-Panhandle Gas Field area of Southwestern Kansas, Western Oklahoma and Northwestern Texas.

By 1958, the United States Department of Interior had made comprehensive studies demonstrating that helium from this area would be required for governmental and commercial needs. (RI, Ex. Vol. III, 556). Unless the helium were extracted for later beneficial use, it would be irretrievably lost as the gas field became depleted. In the latter event, helium demand could only be supplied from a few isolated sources at production costs up to $350.00 per m.c.f. of helium, with the remainder obtainable only from the trace of helium in the atmosphere at a cost then estimated to be $10,000 per m.c.f. (RI, Ex. Vol. VI, 1131, Ex. Vol. II, 296).

Thus, the Interior Department proposed to Congress that amendments be made to the existing Helium Act, to enable the United States to extract helium from the existing inexpensive sources for future sale and use. From extensive committee hearings on the proposed amendments, Congress was fully aware that the natural gas containing the helium was regulated as to rates and transportation pursuant to the Natural Gas Act.

The language of Section 11 of the Helium Act Amendments (50 U.S.C. §167i) excluding helium from rate regulation under the Natural Gas Act, was carefully worked out by the Senate committee together with the Federal Power Commission. (RI, Ex. Vol. V, 919). The legislative history shows without question that the statute states precisely what was intended—that the provisions of the Natural Gas Act are not applicable to the sale of helium "either prior to or subsequent to" the extraction of helium from the gas stream. (441 F.2d at 718). The necessary consequence was to make clear that FPC rates al-

lowed for natural gas constituted payment only for the jurisdictional natural gas, and could not actually nor legally be considered a payment for the unregulated, nonjurisdictional helium. It was recognized that, because of the emergent high demand for current and future use, helium extracted for such use had acquired "great value". (441 F.2d at 706).

The value question was explored in House subcommittee hearings discussing Section 1 of the proposed amendments (ultimately §3), providing for helium acquisition and eminent domain powers. As proposed by the Interior Department, that section would have made no mention of any payment for the value of helium as a commodity. (RI, Ex. Vol. IV, 703, 725, 817, 829). Congressman Rogers, Chairman of the Subcommittee on Mining, however, presented a revised version on this point which was ultimately enacted over the continuing objection of Interior. (RI, Ex. Vol. IV, 711-719, 821). The enacted revision provided that if the helium could not be obtained by contract for "market value", that it would be obtained by condemnation, "the just compensation for such condemnation to be measured by terms and prices determined to be *commensurate* with the fair market value. . . ." (50 U.S.C. §167a(a)(2)). (Our emphasis).

The foregoing version was approved after Chairman Rogers, in an interchange concerning market value with Undersecretary Bennett, made clear that the helium value should inure to the benefit of those having interests in the helium, back to the initial interest holders, the royalty owners from whose lands the helium was produced with the natural gas. (RI, Ex. Vol. IV, 827). The revision was enacted despite express objections of the Interior Department (RI, Ex. Vol. IV, 829), which in this litigation has continued to object to payment of helium value to those supplying the helium to the extracting plants.

It was also developed in subcommittee hearings that "there is no such thing as a true competitive market for helium" (RI, Ex. Vol. V, 867), and thus there was not then a market price, but merely an arbitrary price set by the government under its then existing monopoly. The only suggestion made as to the means for determining a value "commensurate with fair market value" was to consider the value of helium extracted by industry and sold in a competitive market, in connection with the costs incurred in its extraction. (Hearings Before Subcommittee on Mines and Mining, pp. 38-39, 103, 105, March, 1960). Indeed, the Department of Interior was well aware that the appropriate method for determining value of helium prior to extraction from the gas stream was the "value-less-expense" or work-back method, which was an established principle in the gas industry for ascertaining value of separate products extracted from gas streams. (RI, Ex. Vol. II, p. 298, Vol. III, 634-635). This method starts with an established competitive market value of the extracted, marketable product, based on actual sales for beneficial use, and deducts extraction costs including a fair return or profit for the extraction function, to arrive at value prior to extraction. (A. 30a-31a, 554 F.2d at 387-388).

When, therefore, in 1961, the Interior Department entered into four long-term helium conservation contracts, one with Phillips, the price provisions recognized the potential right of producers, such as Ashland, and the royalty owners, to receive a value for the helium they supplied. (A. 5a). The base contract prices, averaging $11 to $12 per m.c.f., were themselves fixed without relationship to market value. (554 F.2d at 384, 389). But a special price escalation clause was included by which, if Phillips was required to pay more than about $3 per m.c.f. to third parties for the helium supply, the government would pay

an additional price to Phillips for all amounts above the $3 owed to third parties. (RI, Vol. I, 91-95). This provision thus complied with 41 C.F.R. §§1-3.403-2 and 1-15.205-7 (1961) pertaining to contingent price escalation provisions, which required that the base contract price not include any amount for the contingency for additional price payments.

The decision of the government to enter into the conservation contracts with these companies was itself a practical one, because it knew that condemnation of thousands of producer and royalty interests would be time consuming and would unduly delay the entire conservation program. (RI, Ex. Vol. II, 478, Ex. Vol. III, 491, 556).

Section 15 of the Helium Act Amendments (50 U.S.C. §167m) also expressed the intent of Congress to encourage individual enterprise in helium development. (441 F.2d at 718). As a consequence several private helium plants were built in the 1960's for supply of the current market demands, resulting in a highly competitive price war, depressing prices as low as $20 per m.c.f., wholesale, F.O.B. at the helium plants. These plants were located on gas streams which either have already been depleted, resulting in plant closure, or will soon be depleted.

Upon further depletion of the present helium reserves, the helium acquired by the government will be purified and sold so as to recover all acquisition and storage costs, at no ultimate cost to the taxpayers. (RI, Vol. III, 650; 50 U.S.C. §167d).

The Helium Litigation

In 1963, the three other helium conservation contractors filed federal interpleader class action suits in Kansas to determine the helium liability and value questions. Both Phillips and Ashland were named parties to some

of these consolidated suits, and took opposing stands on the liability issue. In *Northern Natural Gas Company v. Grounds,* 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063, the helium extractors were held liable to producers for the helium value, and the producers in turn were held obligated to pay fractional royalties to the landowner-royalty class members. Since the helium extractors had paid only federally regulated rates for natural gas, pursuant to the Natural Gas Act, and these filed rates superseded contract price provisions and contract price escalation provisions, and because those rates could not legally apply to helium in the natural gas, as expressly provided by Section 11 of the Helium Act Amendments, it was apparent that payment had not been made for helium.

The court of appeals also considered and followed this Court's decisions holding that the filed rate for the commodity or service covered is the only lawful rate, and no deviation from it is legal. (441 F.2d at 720). Moreover, Section 4(b) of the Natural Gas Act, 15 U.S.C. §717c (b) forbids "any undue preference or advantage". If a natural gas company paying for jurisdictional natural gas under a filed rate, receives in addition a valuable unregulated commodity for no additional payment, there would exist an illegal deviation and preference to that company.

This Court construed the *Grounds* holding with reference to a question of federal subject matter jurisdiction, in *Phillips Petroleum Company v. Texaco,* 415 U.S. 125 (1974):

> "The *Grounds* case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium con-

> stituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium." (415 U.S. at 128).

But this Court was careful to note that the cause of action was not a federal claim implied from the federal statute, but rather that the right of recovery itself was "in quantum meruit, whose source is state law and not federal law." (415 U.S. at 129). The Natural Gas Act and Helium Act Amendments merely bar Phillips' defense of payment. (415 U.S. at 129).

In the meantime, this case had been filed by Ashland against Phillips in 1967, after clarification of pleadings in the Kansas action. Ashland sought recovery for the value of its helium, and also sought recovery of over half a million dollars for contract rate increases for natural gas based on increases allowed by the FPC to Phillips on its resale to Michigan Wisconsin. Ashland had not filed with the FPC for these increases, but sought to rely on Phillips' own filings or alleged obligation to file. Phillips applied to the FPC for an order that Ashland's own filings for natural gas rates were conclusive. The FPC sustained its position, thereby enabling Phillips to pocket the half million dollars owed under the contract. The FPC, however, made it crystal clear that none of the natural gas rates allowed by it were applicable to the helium in the gas because "Under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium." *Phillips Petroleum Company v. Ashland Oil & Refining Company,* 40 FPC 390 (1968), affirmed in *Ashland Oil & Refining Company v. FPC,* 421 F.2d 17 (6th Cir.).

Thus, the valuation of Ashland's helium was tried in the Oklahoma federal court in 1973, and was the subject of the ensuing proceedings as described earlier herein.

After the court of appeals in 1975 affirmed the district court's work-back valuation method,[3] it granted a rehearing *en banc,* to be consolidated with the valuation phase appeals from the Kansas litigation in the *Grounds* case (in which the Kansas federal district court had rejected the work-back method). Upon a consolidated appellate record, the *en banc* decision in this case was handed down in 1977, affirming the major aspects of the Oklahoma federal court's work-back valuation method, and rejecting the base contract price as an element in the valuation. Because Phillips and the government had complained on appeal that the $20 selling price of marketable helium used in the method had not been documented by evidence of specific sales, the court remanded for additional evidence on that point, and as to other relatively minor expense items utilized in the valuation method.

But the court of appeals did not, and has not, decided the second round of appeals in *Grounds* involving the valuation phase. Since the purpose of the consolidated appellate proceedings on a consolidated record in this case and the Kansas cases, was to arrive at a consistent result, it is readily apparent that the court in its 1977 *en banc* opinion decided and remanded the limited issues in this Oklahoma case, because it agreed with the valuation method of that district court, and obviously disagreed with the Kansas district court. But when the Oklahoma district court in 1978 decided that its 1973 decision was "erroneous" in rejecting the base contract price as an element in the valuation, despite the appellate affirmance of that aspect, the decision caused immeasurable confusion.

Rather than enforcing adherence to the prior *en banc* decision, therefore, the court of appeals, in its 1979 de-

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3. This unpublished opinion is found in the Appendix to Ashland's Petition in No. 79-1241, p. 43a.

cision threw up its hands and summarily affirmed, without discussion of Ashland's major complaint on appeal.

None of these latest developments during the valuation phase, however, concerned the liability question now raised again by Phillips.[4]

ARGUMENT

Northern Natural Gas Company v. Grounds, 441 F.2d 704 (10th Cir., 1971), cert. denied, 404 U.S. 951, 1063 was decided based upon a massive record, including all types of gas purchase contracts and contract prices, after extensive briefing and extended oral argument. This Court denied petitions making the same arguments, which were based on the same type of contract as Phillips relies on here, and on all other types of natural gas contracts. The court of appeals, sitting *en banc* on rehearing, correctly rejected the same argument in *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir., 1977), cert. denied, 434 U.S. 921, 968, and, again, certiorari was denied on petitions making the same argument concerning the same facts.[5]

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4. It is the permitted relitigation of the principal helium valuation factor in the 1978 "evidentiary hearing" which is the subject of Ashland's petition to this Court in No. 79-1241.

5. Aside from Phillips' liability on Ashland's local *quantum meruit* claim for helium value, the *en banc* opinion effectuated this Court's required application of federal law to the peripheral issues of prejudgment interest, limitations, and attorneys' fees, under *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1934); *United States v. County of Allegheny*, 322 U.S. 174 (1944); and *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942).

Phillips' complaint of that aspect of the holding in its 1977 petition (No. 77-221) was opposed by the United States in its petition. (No. 77-530). Phillips' present petition fails to explain that aspect of the case, and fails to recognize that it is completely consistent with Ashland's *quantum meruit* right of recovery under local law. That aspect related only to the valuation phase, not the liability issue to which the present petition is confined.

The liability issue had been completely and separately tried in the district court, and was completely disposed of in *Grounds*. The valuation remand in 1971, thus, did not relate at all to that issue. *Grounds* denied the precise defense of payment which is now pursued by Phillips in its petition, as noted in *Phillips Petroleum Company v. Texaco*, 415 U.S. 125 (1974).[6] Since four petitions to this Court complaining of *Grounds* have already been denied since 1971, this fifth petition should also be denied, particularly in view of the extensive valuation proceedings since 1972 which have been premised on the liability holding in *Grounds*.

Moreover, the decision in *Grounds*, that those owning and supplying valuable helium are entitled to payment for what they supply, is an issue confined to the helium litigation in the Tenth Circuit. It is of limited significance, in that the issue is not likely to recur in future litigation.

The strained attempt by Phillips to compare *Grounds* with this Court's decisions on whether private federal causes of action may be implied from federal statutes (Petition, pp. 18-19) is obviously fallacious, because the causes of action in *Grounds* were in *quantum meruit* under "state law not federal law." *Phillips Petroleum Company v. Texaco*, 415 U.S. at 129.[7]

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6. The court of appeals in *Grounds* found it unnecessary to consider other theories of recovery argued by producers, in view of its holding in this respect. (441 F.2d at 722). It was thus conceded by the United States in its 1977 Petition in this Court that even if *Grounds* were reviewed and reversed, it would require a remand for further litigation over liability. (Petition, p. 22, No. 77-530).

7. Phillips' "question presented" (Petition, p. 2), designed to fit its argument, is thus misleading. The *quantum meruit* right of recovery is not a federal right implied from the federal statutes. Rather it is a state, or local, claim arising from the *fact* that the federal rate for natural gas does not constitute a payment for helium, which is specifically and jurisdictionally excluded from that rate. (415 U.S. at 128-129).

Phillips' assertion that Texas law is to the contrary is devoid of merit. It cites in support only *Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S.W. 707 (1901), which merely applied the ordinary rule that an express contract excludes an implied contract on the same subject. This rule is not applicable to an action in *quantum meruit*, or quasi-contract, which refers to that class of obligations "Imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice." *Carpenter v. Josey Oil Co.*, 26 F.2d 442 (8th Cir.).[8]

When governmental rate regulation confines the applicability of a contract price, the rate paid and what it covers must necessarily comply with the regulation. That is why an FPC rate for natural gas does not constitute a payment for nonjurisdictional helium, as this Court recognized in construing the *Grounds* decision, in *Texaco*, 415 U.S. at 128. That is also why the FPC has carefully refrained from dealing with helium in the gas, which helium is not within its jurisdiction. *Phillips Petroleum Company v. Ashland Oil & Refining Co.*, 40 FPC 390 (1968).

Thus, this case does not present the question whether a federal statute intends "to create a private right" of recovery for helium. (Petition, p. 19). The federal statutes merely confine natural gas rates to the natural gas, and provide that these rates do not apply to provide payment for commingled helium. This congressional intent is unarguably clear and specific. As held in *Grounds*, payment

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8. Phillips also errs by reading *Grounds* to have held that title to helium passed to Phillips. (Petition, pp. 4, 11). The long-term gas contracts were executory, so that sales occur only when gas is physically delivered. *Texas Oil & Gas Company v. Vela*, 429 S.W.2d 866, 871 (Tex. Comm. App., 1926). Absent payment for helium, the "title fails. . . ." *Grounds*, 441 F.2d at 723. Payment of FPC rates for natural gas is not payment for the helium.

of these rates "will not be regarded as payment for the helium constituent and cannot be asserted as a defense. . . ." by Phillips. *Phillips Petroleum Company v. Texaco,* 415 U.S. 125, 128 (1974). The payment required under the local or state claim in *quantum meruit* is not, thus, a claim inferred from federal law. Cf., *Cort v. Ash,* 422 U.S. 66, 78 (1975).

There is no contract provision between Ashland and Phillips that specifies a payment for commingled helium. The contracts, filed as FPC rate schedules, merely provide a price per m.c.f. for the natural gas. Thus, whether the FPC (now FERC) allows that stated price, or a different price, as a natural gas rate, the payment of that rate is clearly not for helium. To then allow Phillips to have valuable helium without payment would be "startling", to use the court's language in *Grounds.* (441 F.2d at 719).

Phillips, in reality, is attempting to circumvent the keystone of federal rate regulation, this Court's long-standing filed rate doctrine, that the legal rate applies only to what the law specifies. This Court's decisions expounding that doctrine were recognized and applied by *Grounds* (441 F.2d at 720), as well as by the FPC, *Phillips Petroleum Company v. Ashland Oil & Refining Company,* 40 FPC 390 (1968), affirmed, 421 F.2d 17 (6th Cir.), in holding that federal natural gas rates do not apply to Ashland's helium. *Phillips Petroleum Company v. Texaco,* 415 U.S. 125 (1974) held that this result did not give rise to a federal right implied from the statutes, but rather merely precluded a defense of payment in the *quantum meruit* state, or local, cause of action for recovery of helium value.

We have noted that Ashland's contract prices are directly tied to increases in rates obtained by Phillips from Michigan Wisconsin Pipeline Company to whom it resells

the natural gas. Phillips' rates to that purchaser are directly limited by federal rate regulation, thus similarly limiting Ashland's rates, which are also filed with and governed by the federal commission.

The stubborn fact that Ashland's FPC filed rates for natural gas do not constitute payment for helium is also vividly illustrated by the FPC proceedings which were an outgrowth of this very case, as described in our Statement. *Phillips Petroleum Company v. Ashland Oil & Refining Company*, 40 FPC 390. Ashland was held not entitled to collect from Phillips over one-half million dollars in admitted deficiencies in payments below the contract price because an FPC filing for the increase was not promptly accomplished. Significantly, the FPC referred to this Court's decisions on the federal filed rate doctrine (followed later in *Grounds*), and recognized that "under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium."

Phillips is attempting to limit Section 11 of the Helium Act to a discriminatory statute for the private benefit of the helium extractors, contrary to the terms of the statute, and contrary to the intent of Congress.

In essence, therefore, Phillips is attempting to obtain judicial repeal of Section 11 of the Helium Act, and to substitute for it a judicial judgment that commingled helium should be subject to the FPC's rate regulation under the Natural Gas Act. This effort must fail, just as the same effort failed long ago in *Grounds*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 28, 1980

APPENDIX

Section 4 of the Natural Gas Act, 52 Stat. 822; 76 Stat. 72, 15 U.S.C. Sec. 717c, subsections (a), (b), & (c), provide:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. Sec. 167i, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

Supreme Court, U.S.
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No. 79-1250

IN THE

Supreme Court of the United States

October Term, 1979

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

ASHLAND OIL, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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April 1980

1. The Government says it is reluctant to ask the Court to grant the petition because of the past denials of petitions raising the same question. (*Id.*) Ashland in its brief in opposition belabors the prior denials.

The prior denials are a fact.* In our petition we did not attempt to disguise or hide the fact. We there said that, if the prior denials were to any extent the function of a belief that the question as presented in petitions addressed to interlocutory judgments might disappear after the remands, there is no longer ground for such a belief. And we stated our conviction that the question has grown in importance since the first denial of certiorari in the *Grounds* case and even since the petitions of Phillips and the Government for review of an interlocutory judgment in this case were denied in 1977. The growth in importance of the question results, in our view, from the increasingly stringent standards applied by this Court in recent terms in deciding whether a federal statute creates a private cause of action in derogation of generally applicable state law; the effect of the court of appeals' interpretation of Section 11 of the Helium Act and the Natural Gas Act is analogous to the creation of a private right of action. (Pet. 17-20.) We reply to Ashland's contrary argument on that score after we respond to the other reasons the Government gives for not supporting Phillips' petition.

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*The prior denials are clearly not a bar to a present grant of certiorari. (See Pet. 20-21.) Ashland does not, because it cannot, say that they are, though it attempts to insinuate as much. (Ashland Br. in Opp. 3-4, 15.) The statement that "jurisdiction of Phillips' petition . . . rests on very thin ice" (*id.* at 5-6 n.2) is just rhetoric. There is no doubt that Phillips has raised and preserved the issue it poses here and has presented it in a timely-filed petition addressed to the first final judgment of the court of appeals that raises the issue. The Government, watchdog of the gates to this Court, raises no question concerning jurisdiction.

2. The Government says that apparently the trial court decision now affirmed by the court of appeals will have little if any financial impact on it. (U.S. Resp. 13.) It is true that the district court's assessment of the wellhead value of helium was more realistic on the remand than on the original trial. Ashland's windfall and conversely Phillips' liability in this case have been substantially reduced as a result. Nevertheless, as the Government also remarks, "Phillips and others are exposed to large claims. . . ." (*Id.*). That is indeed the fact. The large pending claims underscore the importance of the question presented here. Phillips, which has a large immediate liability to satisfy even on the reduced judgment in this case, is faced with claims involving much larger volumes of helium in pending state court proceedings. In each of those cases, the threshold issue is whether federal statutes are to be interpreted to relieve one party to a contract of its obligation thereunder and allow it to recover as if it had never contracted to sell the commodity in question. This Court and not the court of appeals is the proper court to decide whether federal statutes do indeed intrude so deeply into matters of state contract law. The omnibus *Grounds* case, involving even larger potential claims, remains pending in the court of appeals, the outcome uncertain but dependent ultimately on the resolution of the fundamental issue posed here.

3. The Government acknowledges that, despite its relatively small financial interest in this case as it has finally been decided, the decision below threatens to frustrate a broader national interest. The interest is in the conservation of helium. The Government says that Phillips and other companies "may be deterred from conserving helium if the judgment below stands." (*Id.*) The point is a significant one, and it is underplayed by the Government. Conservation of helium *is* being deterred by uncertainty, in-

duced by the judgment below and the interlocutory decisions in the pending *Grounds* case, as to whether the prospective conserver will have to pay for any helium it places in storage some amount in addition to what it has contracted to pay for natural gas including helium. Writing in *Science* for December 7, 1979, on the "Helium Question," Professor Earl Cook of Texas A. & M. alluded to the original judgment in this case and said that at $17 per mcf it could, if sustained, "constitute a major impediment to helium conservation." The size of the judgment has been reduced, but Professor Cook's concern was more general. "At present, any helium extracted and put in storage carries with it the risk of substantial but unknown future payments to landowners and natural gas producers." P. 1146.

The Government unfortunately misconceives and therefore mistakenly belittles the nature of the deterrent to conservation that Professor Cook has described. The Government says that, "so long as the formula approved by the court of appeals permits the extracting firms to earn a fair return, it is not clear that the conservation program is imperiled." (U.S. Resp. 13.) Whatever "formula" for pricing helium at the wellhead was "approved by the court of appeals" in this case or might be approved by it in some other case cannot have more than an accidental relationship to a fair return for a firm considering now whether to store helium for sale to unknown others in the distant future. No formula can be responsive to that firm's problem. That firm must estimate the price that its helium will bring in the future and the capital costs and direct storage costs of holding the helium until it is sold; its calculations of whether helium storage will yield a profit, difficult enough at best, becomes impossible if it does not even know the basic cost of acquiring the helium it is proposing to store. It cannot know that basic cost figure if it is subject to a

quantum meruit lawsuit, in which it risks being made to pay for helium at the wellhead an amount related to some current estimate of the going price of extracted crude helium or refined helium or whatever. Any "formula" by which a court determines a wellhead price on that basis will have no relationship except by accident to the firm's return on the helium it may store.

4. Ashland argues that the analogy we have drawn between this case and the private right of action cases of this term and last is a false analogy. The most succinct statement of its argument is this: "The federal statutes merely confine natural gas rates to the natural gas, and provide that these rates do not apply to provide payment for commingled helium." (Ashland Br. in Opp. 16.) That formulation masks the nature of the transaction, the terms of the federal statutes involved and how far the court of appeals has extrapolated from their terms. We summarize: Ashland contracted to sell natural gas to Phillips at certain prices. The contracts covered the helium component of the natural gas. When producer prices of natural gas came under federal regulation, the contracts were filed with the Federal Power Commission under provisions of the Natural Gas Act. The contracts have since continued to be given effect according to their terms, except when Ashland did not make a required filing with the FPC; otherwise the FPC has not manifested the slightest interest in them. Section 11 of the Helium Act was enacted after the contracts were filed with the FPC. It stated that the Natural Gas Act was not applicable to sales of helium – in other words, that the FPC could not control the price of helium. On the interpretation adopted by the courts of appeals, Section 11 (read with emanations from the Natural Gas Act) means vastly more than what it says. It means that, where parties have agreed on a price for helium and there has not been the least attempt by the FPC to coerce or regulate the price

under the Natural Gas Act, a party is free to ignore this agreed price and collect an additional amount for the helium by way of quantum meruit. The federal statute is given that effect even though under the applicable state law there can be no quantum meruit recovery where a matter is covered by an express contract.

Giving that effect to a federal statute whose command seemingly runs only to the agency that administers the Natural Gas Act is, we submit, analogous to reading into a federal statute a federal private right of action that does not appear on its face. It opens the way for a recovery in derogation of state law, which would hold the parties to their contract. Despite Ashland's contrary protestations, the analogy holds regardless whether, once the party is free of the obligations of the contract it willingly entered into and the way to recovery is thus opened, the quantum meruit recovery itself is measured according to state law or according to federal law. Our argument does not depend on whether the workback valuation method is a creature of state or federal law.

In that regard, Ashland now says that the quantum meruit law that was applied was state law. (Ashland Br. in Opp. 15-16 & n.7.) The court of appeals has never said so. Ashland has never said so before. The proposition seems unlikely. The en banc opinion of the court of appeals emphasizes federal law and the reasons why it was being applied to "peripheral issues" (*id.* at 14 n.5) such as prejudgment interest. (Pet. App. 35a-41a.) Taking the court of appeals' view, no reason suggests itself why the central issue in the case, the valuation issue, should have been treated differently from those other issues. The apparent application of federal law by the court of appeals in assigning a quantum meruit value to the helium is further reason for

granting the petition because it results in an even deeper intrusion into matters of state concern.

Respectfully submitted,

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